

STATUS OF THE INDIAN TRUST FUND LAWSUIT, COBELL V. NORTON

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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OVERSIGHT HEARING ON THE STATUS OF THE INDIAN TRUST FUND LAWSUIT, COBELL V. NORTON

**Wednesday, February 16, 2005
U.S. House of Representatives
Committee on Resources
Washington, D.C.**

The Committee met, pursuant to notice, at 11:01 a.m., in Room 1324, Longworth House Office Building, Hon. Richard W. Pombo [Chairman of the Committee] presiding.

Present: Representatives Pombo, Hayworth, Cubin, Radanovich, Gibbons, Walden, Flake, Pearce, Nunes, Gohmert, Faleomavaega, Pallone, Christensen, Napolitano, Tom Udall of New Mexico, DeFazio, Inslee, and Herseth.

STATEMENT OF HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The CHAIRMAN. The Committee on Resources will come to order. The Committee is meeting today to hear testimony on the status of the Indian Trust Fund lawsuit, Cobell v. Norton.

The CHAIRMAN. Under Rule 4(g) of the Committee Rules, any oral opening statements at the hearing are limited to the Chairman and Ranking Minority Member. This will allow us to hear from our witnesses sooner and help Members keep to their schedules. We have a 2 p.m. hearing today in this room, so we cannot make this a long hearing. Therefore, if others have statements, they can be included in the hearing record under unanimous consent.

The purpose of today's hearing is to do a status check on the Indian Trust Fund lawsuit entitled Cobell v. Norton, filed nine years ago by Elouise Cobell, a member of the Blackfeet Indian Nation. The lawsuit was filed in order to force the government to perform an historical accounting of certain monies it manages on behalf of around 300,000 Indians. Although the defendant in this suit is currently Secretary Norton, it was originally filed against her predecessor, Bruce Babbitt, and the origins of the case stretch back to the 19th century.

I won't use the Committee's time giving a detailed history of how the Department got into this mess. The story is narrated quite well in the written testimony of today's witnesses. Suffice it to say that from the late 1800s until recent years, the government failed to do

the basic housekeeping necessary to maintain orderly records of individual Indian money accounts. Prestigious accounting firms have been hired at great cost to figure out the old accounting system and they can't.

Elouise Cobell is a banker who understands the basic duty to provide an accounting of money. She wasn't able to get the government to deliver on its duty in 1996, so out of a just sense of frustration, she filed the lawsuit as a last resort. But after nine years in court, the individual Indians still don't have their accounting. Elders are passing away without knowing if their monies were properly handled. It is embarrassing that the first Americans are the last in line when it comes to speedy justice, which is not being provided in the court.

Unfortunately, after nine long years, the lawsuit has taken on the character of a blood feud. It consumes massive time and resources in the Department, time and resources better spent on helping Indians and their tribes as well as non-Indian members of the public who rely on other Interior services.

Under the supervision of myself, Ranking Member Rahall, and the leadership of the Senate Indian Affairs Committee, two mediators were appointed last year to seek a resolution. As of today, we are still without a resolution. So we have to ask ourselves, is it time for Congress to step in and legislate a resolution?

I, for one, do not think there is a clear end in sight to the litigation and both sides must realize there is a huge value and time savings alone if we clear this case up this year.

Before we hear from the witnesses, I want to lay a few ground rules. We are looking for basic information about how to provide a settlement this year. Neither witness is obliged to divulge information that is of a confidential nature or that might affect his position in the lawsuit. We are not looking for a courtroom battle, and so anything resembling such is strongly discouraged. This is a chance to find a constructive end that finally brings closure to the Department and a fair settlement for the class of plaintiffs. Thank you.

I now recognize the Ranking Member, Mrs. Napolitano.
[The prepared statement of Mr. Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman,
Committee on Resources**

The purpose of today's hearing is to do a status check on the Indian Trust Fund lawsuit, titled "Cobell versus Norton."

Filed 9 years ago by Elouise Cobell, a member of the Blackfeet Indian Nation, the lawsuit was filed in order to force the government to perform a historical accounting of certain monies it manages on behalf of around three-hundred thousand Indians.

Although the defendant in this suit is currently Secretary Norton, it was originally filed against her predecessor, Bruce Babbitt. And the origins of the case stretch back to the 19th century.

I won't use the Committee's time giving a detailed history of how the Department got into its mess. The story is narrated quite well in the written testimony of today's witnesses. Suffice it to say that from the late 1800's until recent years, the government failed to do the basic housekeeping necessary to maintain orderly records of individual Indian money accounts. Prestigious accounting firms have been hired at great cost to figure out the old accounting systems...and they can't.

Elouise Cobell is a banker who understands the basic duty to provide an accounting of money. She wasn't able to get the government to deliver on its duty in 1996. So out of a just sense of frustration, she filed the lawsuit as a last resort.

But after 9 years in court, the individual Indians still don't have their accounting. Elders are passing away without knowing if their monies were properly handled.

It's embarrassing that the First Americans are the last in line when it comes to speedy justice, which is not being provided by the courts.

Unfortunately, after 9 long years, the lawsuit has taken on the character of a blood feud. It consumes massive time and resources in the Department, time and resources better spent on helping Indians and their tribes as well as non-Indian members of the public who rely on other Interior services.

Under the supervision of myself, Ranking Member Rahall, and the leadership of the Senate Indian Affairs Committee, two mediators were appointed last year to seek a resolution.

As of today, we are still without a resolution. So we have to ask ourselves: is it time for Congress to step in and legislate a resolution? I for one do not think there is a clear end in sight to the litigation, and both sides must realize there is a huge value in time savings alone if we clear this case up this year.

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STATEMENT OF HON. GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Mr. Chair. I have a statement from the Ranking Member, Dale Kildee, and I would like to read it into the record. I certainly thank you for the opportunity. He will not be able to make it. He has apparently a markup.

I want to thank you for scheduling this hearing today. Because of the complexity of the issues involved in the trust reform, the issues in the Cobell litigation relating to mismanagement and accounting of the Indian trust, and the time it has taken us to address the trust fund management, under both Democratic and Republican leadership, the appropriators have become very impatient with us on this issue. So I, along with my colleagues from both sides of the aisle, have fought appropriations writers. We have run out of excuses and we must work together to resolve the outstanding issues arising from the Cobell litigation.

I want to commend Chairman Pombo and Ranking Member Rahall for working with the Senate Committee on Indian Affairs to seek a settlement agreement between the parties through a mediation process. I, like the rest of my colleagues, was disappointed in the stalemate that occurred between the parties after six months of negotiation and hope that today's hearing will shed light on the outstanding issues and that we can work together to resolve those issues so that we can finally offer a legislative solution to the trust reform management and settlement of the Cobell litigation and look forward to hearing from the witnesses.

Mr. Chairman, I would like to enter this into the record.

[The prepared statement of Mr. Kildee follows:]

Statement of The Honorable Dale E. Kildee, a Representative in Congress from the State of Michigan

Good morning. Mr. Chairman, I want to thank you for scheduling this hearing today.

Because of the complexity of the issues involved in trust reform, the issues in the Cobell litigation relating to mismanagement and accounting of the Indian trust, and the time it has taken us to address trust fund management under both Democratic

and Republican leadership, the appropriators have become very impatient with us on this issue.

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I hope that today's hearing will shed light on the outstanding issues and that we can work together to resolve those issues so that we can finally offer a legislative solution to trust reform management and settlement of the Cobell litigation.

I look forward to hearing from the witnesses today. Thank you.

Mrs. NAPOLITANO. I would add to that that I hope that this is a lesson for the agencies, the Federal agencies, to keep records that are required and that will help us avoid this turmoil and this distress. In going to court, the lawyers win, the people lose.

Thank you, Mr. Chair.

The CHAIRMAN. Thank you.

Now I would like to introduce our first witness, Jim Cason, the Acting Assistant Secretary for Indian Affairs. Before he takes a seat, I would like to thank Mr. Cason for agreeing to appear this morning. He just finished testifying before the Senate Indian Affairs Committee. The Committee really appreciates how you are meeting the demands on your time.

I will take this time to remind all of today's witnesses that under Committee Rules, oral statements are limited to five minutes. Your entire statement will appear in the record.

Welcome to the Committee. Thanks for being here. I am just going to turn it over to you and let you give your opening statement.

**STATEMENT OF JAMES CASON, ASSOCIATE DEPUTY
SECRETARY, U.S. DEPARTMENT OF THE INTERIOR**

Mr. CASON. I am going to be very brief. I think both your comments and those of the minority are right on point. This lawsuit has been around since 1996, or nine years now, and it is questionable about how much progress, real progress, we are making in resolving the issues.

We have been in court for nine years. We have made numerous trips between the District Court and the Court of Appeals. We have had decisions from the Court of Appeals recently that put us right back down in the District Court. The prognosis at this point, if we continue down this path, is more years and years of continued litigation without real resolution to the issues.

I am greatly encouraged that this committee has taken the leadership role of looking into this issue. You started last year with discussions about hiring a mediator, and I am greatly encouraged that Senate Indian Affairs is also continuing its role in trying to pursue another course of action.

Ultimately, what we have to deal with is a matter of choice. We can choose collectively to go down the pathway of continued litigation for years and years, with a dim prospect for ultimate resolution of the issue to the satisfaction of the parties, or we can choose

to evaluate whether there is any other options that we can pursue in Congress to try and find a fair and full and equitable solution to this issue, knowing full well that we won't satisfy all parties, but can we come up with an approach that is fair for all parties.

The Department of Interior stands ready to do that. We would like to work with this committee and the Senate Indian Affairs Committee to see if we can explore the options that are available, and there are several, to try and approach a solution to this issue that is fair to all concerned. Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Cason follows:]

**Statement of James Cason, Associate Deputy Secretary,
U.S. Department of the Interior**

Mr. Chairman and members of the Committee, my name is James Cason and I am the Associate Deputy Secretary of the Department of the Interior. Thank you for the opportunity to testify today on the status of the Indian Trust Fund lawsuit, *Cobell v. Norton*. As you are well aware, this is a longstanding case that originated in 1996 as *Cobell v. Babbitt*. The Department appreciates the Committee's interest in this case and your desire to help the parties reach a solution.

Congress designated the Department of the Interior as the trustee for one of the most complex and diverse governmental land trust ever established. The Department manages approximately 56 million acres of land held in trust. Over ten million acres belong to individual Indians and nearly 46 million acres are held in trust for Indian Tribes. On these lands, Interior manages over 100,000 leases for individual Indians and Tribes. Leasing, use permits, land sale revenues, and interest all of which total approximately \$205 million per year are collected for 245,000 open individual Indian money (IIM) accounts. About \$414 million per year is collected in 1,400 tribal accounts for 300 Tribes. In addition, the Indian trust fund manages approximately \$3.0 billion in tribal funds and \$400 million in individual Indian funds. Because the *Cobell* case only involves IIM accounts, most of my testimony will focus on the issues related to the management of those accounts.

Although much of what I have prepared to say today has been previously heard by your Committee, I believe it is vital for you to understand the background and facts in order to craft a pathway that will actually make progress for Indian Country. Mr. Chairman, you and your Committee stand at a crossroads in history. We need to work together to resolve this issue promptly and in a meaningful way, so that among other things we can avoid time-consuming and expensive litigation that ultimately is not in the best interest of the parties.

Background

In 1887, Congress passed the General Allotment Act, which resulted in the allotment of some tribal lands to individual members of tribes, mostly in 80 and 160-acre parcels. The expectation was that these allotments would be held in trust for their Indian owners for no more than 25 years, after which the Indian owner would own the land in fee. However, Congress in 1934, through the Indian Reorganization Act, reaffirmed its commitment to tribal governments, halted the further allotment of tribal property, and required that the allotted lands be held in trust indefinitely by the United States for the benefit of the individual owners.

Interests in these allotted lands started to "fractionate" as interests divided among the heirs of the original allottees, expanding exponentially with each new generation. One of the most challenging aspects of trust management is the management of the very small ownership interests, which result in many very small IIM accounts and land ownership interests. There are now over 1.65 million fractional interests of 2% or less involving more than 32,522 tracts of individually owned trust and restricted lands. The Department provides a range of trust services—title records, lease management, accounting, probate—to the growing number of land owners. We have single pieces of property with ownership interests that are less than .000002 of the whole interest. The Department is required to account for each owner's interest, regardless of size. Even though these interests today might generate less than one cent in revenue each year, each is managed, without the assessment of any management fees, and the revenues generated are treated with the same diligence that applies to all IIM accounts. In contrast, in a commercial setting, these small interests and accounts would have been eliminated because of the assessment of routine management fees against the account. Management costs of the

IIM accounts, as well as tribal trust accounts, are covered through the general appropriations process and borne by the taxpayers as a whole, rather than by the accountholders.

Formation of the American Indian Trust Fund Management Reform Act of 1994

In 1992, the House Committee on Government Operations filed a report entitled "Misplaced Trust: the Bureau of Indian Affairs' Management of the Indian Trust Fund." That report listed the many weaknesses in the Bureau of Indian Affairs (BIA) management of Indian trust funds. It pointed out that the General Accounting Office's audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 found fault with management of the system. The report notes Arthur Andersen 1988 and 1989 financial audits stated that "some of these weaknesses are as pervasive and fundamental as to render the accounting systems unreliable."

Arthur Andersen stated it might cost as much as \$281 million to \$390 million in 1992 dollars to audit the IIM accounts at the then 93 BIA agency offices. The 1992 Government Operations Committee report describes the Committee's reaction:

"Obviously, it makes little sense to spend so much when there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken."

The Committee report then moves on to the issue of fractionated heirships. The report notes that in 1955 a GAO audit recommended a number of solutions including eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM accounts to commercial banks, or imposing a fee for BIA services to IIM accountholders. The report states the Committee's concern that BIA is spending a great deal of taxpayers' money administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances of less than \$50.

On April 22, 1993, the late Congressman Synar introduced H.R. 1846. On May 7, 1993, Senator Inouye introduced an identical version, S. 925. It was in these bills that Congress first included a statutory responsibility to account for Indian trust funds. Section 501 was entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Senator Inouye's bill included an effective date provision that stated:

"This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian."

The Senate Committee on Indian Affairs held a hearing on S. 925 on June 22, 1993. Eloise Cobell in her capacity as Chairman of the Intertribal Monitoring Association, testified in strong support of the bill. The only amendment Ms. Cobell recommended in her oral statement, as well as her written statement, was to allow Tribes to transfer money back into a BIA-managed trust fund at any time if they so wanted. Ms. Cobell mentioned "[W]e have amendments, and we are willing to work with the committee on these particular amendments. I am not going to devote any more of my time in my oral presentation to the provisions of the bill because we feel it is an excellent bill."

The Navajo Nation and the Red Lake Band of Chippewa Indians were the only tribes to submit testimony. They supported the bill, and did not object to the prospective application of the accounting section in their testimony.

The Director of Planning and Reporting of the General Accounting Office also testified. He was asked if he agreed with the Arthur Andersen estimates I mentioned above. He stated the following:

"In my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of the transactions are under \$500. One of our reports said there that about 80 percent of the transactions are under \$50. So in cases where you have the small ones, maybe there's a way in which we can reach agreement with

the account holders and the Department of the Interior on how much we will settle for on these accounts rather than trying to go back through many many years, reconstructing land records and trying to find all of the supporting material. It may not be worth it.” [page 29 of S. Hrg 103-225]

On July 26, 1994, Congressman Richardson introduced H.R. 4833 which ultimately became the American Indian Trust Fund Management Reform Act of 1994. The House report on H.R. 4833 notes that H.R. 1846 was the predecessor bill to H.R. 4833. There was one legislative hearing held on H.R. 4833 by this Committee on August 11, 1994. There is no printed record of that hearing. There was no Senate hearing.

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not however include the effective date provision explicitly making the accounting requirement prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

It may surprise Members of this Committee to note that there is no mention of the costs associated with either complying with the Act, or completing the accounting in the Committee’s report. Moreover, no analysis from the Congressional Budget Office was included in the Committee’s report. The Department sent a letter on H.R. 1846 and an amended S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: “We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs.” Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or multi-billion dollar accounting.

Cobell Litigation

In 1996, five IIM beneficiaries filed the Cobell v. Norton class action lawsuit alleging that the government had breached its fiduciary duty in managing the IIM accounts. In 1999, a Federal district court held, in a decision affirmed on appeal in 2001, that the government had breached its fiduciary obligations to plaintiffs. In the litigation, the plaintiffs have sought an accounting, rather than monetary damages, but their argument is that they are owed any money that the government collected but cannot prove was properly distributed to individual Indians since 1887, some of which the government cannot do because of the unavailability of trust records. Under the plaintiff’s theory, they are owed as much as the total amount collected since 1887 (which is estimated to be \$13 billion), plus interest. They calculate the amount to be over \$176 billion.

In September 2003, the district court ordered Interior to conduct a transaction-by-transaction accounting, back to 1887, of all of the IIM accounts that it manages or has ever managed and required that Interior substantially complete this accounting by the end of FY 2006. Interior estimates that complying with the court’s order would cost between \$9 billion and \$12 billion, and even then it would not be able to meet the court’s requirements or its aggressive timeline. The government appealed this order.

P.L. 108-108, enacted on November 10, 2003, provided that nothing in any statute or principle of common law should be construed or applied to require Interior to commence or continue historical accounting activities with respect to the IIM trust until Congress amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of Interior with respect to the Individual Indian Money Trust; or December 31, 2004, whichever came first.

Court of Appeals Ruling

On December 10, 2004, the Court of Appeals addressed the district court’s September 25, 2003 order. The ruling addressed the two main categories of the district court’s decree: “Historical Accounting” and “Fixing the System.” The Court found that Historical Accounting was governed by P.L. 108-108 and thus vacated the district court’s order with respect to that portion of the case. In so finding:

- The Court pointed out that Congress passed PL 108-108 “to clarify Congress’s determination that Interior should not be obliged to perform the kind of historical accounting the district court required.”
- The Court stated “The committee “reject[ed] the notion that in passing the American Indian Trust Management Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has been ordered by the Court. Such an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.”

The Court rejected the plaintiffs' argument that PL 108-108 amounted to a legislative stay of a final judicial judgment and thus violated the separation of powers doctrine. The Court found a critical distinction between statutes that reverse final judgments for money damages and statutes that alter substantive obligations of parties subject to ongoing duties under an injunction.

Plaintiffs also argued PL 108-108 violated the due process and takings clauses of the Fifth Amendment. The Court rejected this argument, noting that plaintiffs did not explicitly identify the property right being taken other than to reference the right to interest earned on trust accounts. The Court also pointed out that "Congress may provide a simpler scheme than the district court's, while nonetheless assuring that each individual receives his due or more."

While the second part of the Court's decision focuses on "Fixing the System," elements of it are important to decisions relating to historical accounting. The Court confirmed an earlier district court observation that the establishment of a trust relationship does not mean that plaintiffs can automatically "invoke all the rights that a common law trust entails." The Court reasserted that the government's duties must be "rooted in and outlined by the relevant statutes and treaties..."

The Court also focused on the government's argument that normally private trust expenses are met out of the trust itself, pointing out "[T]hus plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures."

In short, the Court's decision invites a discussion within both the Executive Branch and the Congress as to what is an appropriate historical accounting.

Status

The litigation in this case continues. It has had a profound effect on every part of the Department. To date, many career employees have had the specter of contempt hanging over them. Within the last few weeks we have been informed that the plaintiffs' lawyers want to depose representatives of the Bureau of Land Management, the Fish and Wildlife Service, the National Park Service, the Bureau of Reclamation, and even the Department's Inspector General. To give you a sense of the case, as of February 10, 2005, the plaintiffs are seeking to depose the following departmental employees or former employees:

- Ethel Abeita, Director, Office of the Special Trustee for American Indians
- Anson Baker, Director, North West Regional Appraisal Office, Department of the Interior
- Brian Burns, CIO, Bureau of Indian Affairs
- Norma Campbell, Retired Director, Office of Planning and Performance Management, Department of the Interior
- James Cason, Associate Deputy Secretary, Department of the Interior
- Francis Cherry, Deputy Director, Bureau of Land Management
- Katheryn Clement, past Deputy Director, United States Geological Survey
- Robert Doyle, Deputy Director, United States Geological Survey
- Galvan Wendall, Records Management Specialist, Department of the Interior
- Jeffrey Jarrett, Director, Office of Surface Mining
- Mary Kendall-Adler, Deputy Inspector General, Department of the Interior
- Thomas Kerstetter, Service Center Specialist, Office of the Special Trustee for American Indians
- Regina Lawrence, Office of Chief Information Officer, Department of the Interior
- Thao Le, Chief Technical Officer, Bureau of Indian Affairs
- Mark Limbaugh, Deputy Commissioner, Bureau of Reclamation
- Donnie McClure, Records Management Officer, Office of Historical Trust Accounting
- John Messano, Director of the Office of Information Operations, Bureau of Indian Affairs
- Pat Moloney, Chief of the Systems Division, Bureau of Indian Affairs
- Donald Murphy, Deputy Director, National Park Service
- William Ragsdale, Director of the Office of Trust Review, Department of the Interior
- Hord Tipton, CIO, Department of the Interior
- Timothy Vigotsky, Retired Director of the National Business Center, Department of the Interior
- Steven Williams, Director, Fish and Wildlife Service

Historical Accounting

Interior conducted a reconciliation for the five named Cobell plaintiffs and their predecessors, reviewing documents which dated back to 1914, and found that 86

percent of the transactions and 93 percent of funds moving through the accounts were properly documented. The review, which cost \$20 million to conduct, did not reveal any collected transactions not included in the selected accounts (with the exception of one transaction posted to the wrong Indian account holder). Moreover, Interior conducted a reconciliation of tribal trust funds based on a statistical sample with certain agreed upon accounting principles and found that 89 percent of total receipts and disbursements for 1972 to 1992 were reconciled with far less than a one percent error rate. At that time, Interior did not have sufficient documentation to reconcile the remaining 11 percent.

As of December 31, 2004, the Office of Historical Trust Accounting (OHTA) had reconciled more than 36,700 judgment accounts with balances totaling more than \$53 million and reconciled 7,360 per capita accounts with balances of over \$21.7 million. As of today, the OHTA has mailed over 11,000 historical statements of judgment accounts to individual Indian account holders and former account holders. By the end of 2005, OHTA will reconcile a total of 34,000 judgment accounts and 9,200 per capita accounts.

Through December 31, 2004, OHTA also resolved residual balances in nearly 8,200 special deposit accounts, identifying the proper ownership of more than \$38 million belonging to individual Indians, Tribes, and private entities. By the end of 2005, OHTA expects to resolve the proper ownership of approximately \$51 million (cumulative) in residual special deposit account balances.

The OHTA also has begun using a contractor-developed accounting reconciliation tool to reconcile land-based IIM transactions. In 2004 OHTA reconciled more than 4,700 land based IIM transactions and by the end of 2005, OHTA will reconcile an additional 7,000. In preparation for completion of historical statements of account for land-based IIM accounts, OHTA will verify and fill any gaps in historical transaction data for approximately half of the BIA regions.

The Administration proposed funding the historic accounting at \$130 million and \$109 million in FY 04 and FY 05 respectively. Despite our request of \$109 million for FY 2005, only \$58 million was appropriated and this includes funding for tribal trust fund accounting as well. The FY 06 budget request for historical accounting is \$135 million, an increase of \$77.8 million over the 2005 enacted level. This amount will provide \$95 million for IIM accounting, an increase of \$50 million above what the Department anticipates it will spend in 2005, and \$40 million for tribal accounting, an increase of \$27.8 million above what the Department anticipates it will spend in 2005.

It is also not clear what will occur in the district court now that the provisions of P.L. 108-108 have expired. The Department has been involved in mediation, but no agreed-upon resolution has yet emerged.

Conclusion

I want to thank the Committee for holding this hearing. We have a historic opportunity to resolve these issues which are fundamental to our responsibilities to our beneficiaries and to the American taxpayer. This concludes my statement. I would be happy to answer any questions the Committee may have.

The CHAIRMAN. I would like, if you could, to give me an idea in terms of resources, time, money, and personnel that the Department is currently spending on the lawsuit and talk about all the different levels of the Department and how it affects your ability to meet the other obligations of the Department.

Mr. CASON. Mr. Chairman, unfortunately, the Cobell litigation is pervasive in the Department of Interior. It has, at one point or another, affected the entire Department, whether the pieces of the Department were involved in this litigation or not. For example, the District Court's order to disconnect from the Internet resulted in shutting off most of the Department from the Internet for a period of time, including the National Park Service, Fish and Wildlife Service, Bureau of Reclamation, Bureau of Land Management, and others, as well as Indian Affairs and OST and our office. Under that particular order, we still have parts of the Department that after three and a half years, or a little more than three years, are still disconnected from the Internet, and that includes the Bureau

of Indian Affairs, the Office of Special Trustee, the Solicitor's Office, and our Office of Hearings and Appeals. These are the folks that actually have to provide services to Indian beneficiaries. So it has had that kind of an impact, where we can't use the capabilities of today's technology to supply services to our beneficiaries.

It has also had an impact on budget. As you just mentioned, I was over with Senate Indian Affairs. The statements from both the Chair and the Vice Chair were very clear that this is a major issue in the budget structure for the Department of Interior. For example, our budget includes a request for \$135 million to conduct historical accounting activities. That \$135 million reflects the priority associated directly with the Cobell lawsuit and what we are required to do to fulfill our accounting obligations pursuant to our January 6 plan offered two years ago. There are other places that that money could be used if we were able to resolve this litigation and move on to other places.

We have a number of our employees that are subject to potential contempt charges. It is dozens of employees, both current and former, who have that cloud hanging over them. And there has been a disincentive introduced into the process where employees don't want to be associated with anything that is related to Cobell for fear that it will adversely affect their careers.

So there are a lot of pervasive impacts associated with the litigation. That is not to say that there isn't some issues that the Department could have done better on in the past. Those are clearly being made, during the course of the litigation, made clear. We recognize and are working very diligently on finding ways to improve the trust, and that is a benefit from the Cobell lawsuit.

But we would like to find a way to resolve it so that we can establish again a positive relationship with our Indian beneficiaries and begin to do more positive things with our time and energy in the Department.

The CHAIRMAN. What is the impact of being disconnected from the Internet? How does that affect the ability of people at the Department to do their job?

Mr. CASON. It has a pervasive effect for the ones that are still disconnected. We have about 95 percent of the Department up and those are the parts of the Department that generally are not involved in Indian affairs.

But if you can imagine in the Department, the Internet provides a great tool for communication. The e-mail systems or the capability to e-mail people within the Department, we don't have. So all of our beneficiaries that are involved in the trust cannot e-mail people inside the Department because we don't have that capability. But if we try to set up payments systems that would involve the Internet, we can't do that. If we try to seek information from Internet sources, we can't do that. Our Solicitor's Office is cutoff from the ability to use the Internet to do their legal research. People in the Office of Hearings and Appeals can't use the Internet to communicate the results of probate decisions.

So there's a lot of places where the Internet would be a useful tool for the Department, but we are not currently able to use it.

The CHAIRMAN. So in terms of communication, it is back to memos being sent?

Mr. CASON. A lot of paperwork and what we call work arounds. We still use our computers, but we have to use them in isolated mode. And if we want anything from the outside world, we have to find other ways to get the information and bring it in, and we call that work around processes. So you may have to go home and use your personal computer to get information. Then you bring it into the office, or you pass disks back and forth across the boundaries of computer systems. So there are ways to try and work around it, but it is not nearly as efficient as having the tools available to us.

The CHAIRMAN. Thank you.

Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair.

I hate to ask. We took it for granted. We use the Internet. Our staffs use the Internet. And yet an agency that is not fully capable of being able to do its job because you are not functioning through the Internet or utilizing the Internet.

Mr. Cason, I am gathering from your comments that the Department will welcome the Congress stepping in, am I correct?

Mr. CASON. Absolutely. I think this is the place where the problem will be solved.

Mrs. NAPOLITANO. Then what elements do you believe need to be a part of the solution of this legislation that might emanate from this body?

Mr. CASON. The Department has considered a number of pathways to possible settlement of the issue. There are process-oriented options and there are cash settlement-oriented options and each of those have permutations that are possible and we would be happy to work with the Committee to look at those.

Ultimately, in my opinion, what we need to address is that there is a matter of expectations and a matter of uncertainty that any settlement will have to deal with, and the expectations that we have now is that there is a substantial error rate inside the accounting systems associated with the Indian accounts and that expectation needs to be addressed somehow because it is inconsistent with the findings that we have actually had from the accounting process we do.

I am not planning today to argue the specifics of how we do accounting and who is doing accounting and exactly what the results are, but what we have found so far in the accounting that we have done is that there are errors. They tend to be small. They tend to be infrequent. They tend to net out close to zero. We haven't found, in the accounting that we have done so far, any signs of systematic or systemic problems or issues of fraud.

Does that mean that if we continue down the pathway of accounting and we keep going further and further back in time and we look at a broader cross-section of accounts, we won't find one? No, it doesn't mean that, it just means that is what we know so far. There is certainly a huge job to do if we continue down the accounting pathway and there are certainly possibilities that we will find something. We just haven't so far.

But there is an expectation that with all the reports of mismanagement and abuse of trust and violations in the past, that there is bound to be something there. So we have an expectation

issue to try to manage, and part of it is uncertainty. In order to get certain about where we are, we would have to do all the work, to go back and do all the accounting. And to do the work would require hundreds of millions, if not billions, of dollars to try and find the answer.

At this point, the Department offered a plan, our January 6 plan from two years ago, that basically involved \$335 million and five years of time to do and involves some statistical reconciliation of accounts. The District Court, on the other hand, offered a structural injunction that we estimated would cost somewhere between \$6 and \$12 billion to do.

So there is a huge range of possible approaches to do this, some which are relatively inexpensive, some which are very expensive, and we are concerned at the Department that no matter what course of action we take on accounting, we will never really broach the issue of expectations and uncertainty to the point that everyone will be satisfied. So it is our thought, if there is a way that we can settle it in a fair and open way through Congressional legislation, that would be great.

Mrs. NAPOLITANO. What would be the right thing to do?

Mr. CASON. Well, in terms of right, I think that is the right thing.

Mrs. NAPOLITANO. OK.

Mr. CASON. We need to find a way to solve this problem.

Mrs. NAPOLITANO. Thank you. And there is no secret that the level of animosity between the plaintiffs and the defendants in this case is exceedingly high. Not blaming anybody, but accepting that all persons are acting in a professional manner, given the acrimony, how do you believe this case can be settled through mediation?

Mr. CASON. We have engaged since last year when this committee and the Senate Indian Affairs Committee prompted both the Department and the plaintiffs to engage in mediation. We have had discussions during that past year.

Mrs. NAPOLITANO. How many?

Mr. CASON. You know, I don't know—

Mrs. NAPOLITANO. One?

Mr. CASON. If you counted up the times that we were together, plaintiffs and defendants, and the times that we met separately with the mediators, I would guess we probably had collectively dozens of times with the mediators, with the various parties.

I think the issue, beyond the acrimony, and acrimony is kind of a reflection of accumulated frustration over nine years' worth of litigation, that if you get beyond the acrimony, part of the issue is, again, managing this issue of uncertainty and trying to find some solution that is fair. But the perceptions of what is fair are so far apart that we had to struggle to find common ground. So I think that is the real root of it, is how do we find some common ground that everyone can live with.

In terms of personal relationships, I think Keith and I get along fine. We are able to have rational conversations between the two of us. But our positions are pretty far apart on how we think this ought to be treated.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

The CHAIRMAN. Mr. Hayworth?

Mr. HAYWORTH. Mr. Chairman, I thank you.

Secretary Cason, welcome. It should come as no surprise, with all the implications involved in this case, it ripples across the width and breadth of Indian country, right into the Fifth Congressional District of Arizona for some of my constituents. My concern deals with one aspect of the challenge everyone confronts.

Jim, can you report of the progress on the Section 131 Trust Demonstration Projects that allow ten tribes, including the Salt River Pima Maricopa Indian community in my district, to manage their own trust resources?

Mr. CASON. Sure, Congressman. What used to be Section 139 in the appropriations language, now Section 131 in the 2005 appropriations language, is basically a demonstration project to facilitate additional self-governance and supportive self-governance. Former Assistant Secretary Dave Anderson, myself, the Principal Deputy Assistant Secretary Ross Swimmer, we have met often, often in terms of probably a half-dozen times since Section 139 was passed, and we most recently met with the representative group of the 131 tribes probably not more than three or four weeks ago.

So we have had a continuing dialogue with the group about what they would like to see happen. I think we have been reasonably accommodating with them, because all of us in the management chain are all very supportive of the concept of self-governance and self-determination and we are looking for ways to foster that. So I think it has been pretty successful so far.

Mr. HAYWORTH. Jim, you spoke of the work arounds because of the court decisions.

Mr. CASON. Yes.

Mr. HAYWORTH. Given that fact, and now through this demonstration project, in light of some of the difficulties you are encountering at the Department, in your estimation, do these tribes do a more efficient job than the Department of Interior in dealing with this challenge?

Mr. CASON. I think in some cases, there are things that we can learn from each other, or probably in all cases, we can learn from each other. Tribes who employ compacts or contracts to do things on their own, using their own systems, often can set up a way of doing business for their particular tribe that is very effective, and we have done an evaluation of the 131 tribes through OST and take a look at how they are managing their trust responsibilities and found that, in large part, they were operating as effectively as any Bureau program, and so we found that this was a direction that we could support with them.

Mr. HAYWORTH. Do the demonstration projects relieve the Department of the burden of some of the administrative costs?

Mr. CASON. I am not sure it really removes a burden. It is a transfer, because ultimately, we end up in the position that when we are supporting self-governance, BIA and OST are still funding a lot of the activities, though I would say, in fairness to Indian tribes that engage in self-governance, that what I have been told by tribal leaders as we have met with them is that often, tribes will place some of their own money into the services that they are

providing to supplement or augment the Federal appropriations they get. So they end up providing increased services.

Mr. HAYWORTH. Are there any plans to expand the program?

Mr. CASON. The 131 program?

Mr. HAYWORTH. Yes.

Mr. CASON. I am not knowledgeable that there is a plan to expand the 131 program because that has an appropriations route, but we are very supportive just as an internal policy of self-governance, self-determination, and are happy to work with any tribe that wants to take on more responsibility for their own actions.

Mr. HAYWORTH. I thank you for your answers, and Mr. Chairman and my colleagues, at the very least, I would like to express a great interest in continuing this demonstration project. My experience has been the demonstration project allows the Salt River Pima Maricopa community greater self-sufficiency. The tribe is more efficient. They are able to distribute checks in a more timely manner than the way we have seen through other vehicles. I just appreciate the time and the testimony, and now Madam Chairman, I—

Mr. CASON. Just one comment. I will appreciate your comments on that. I am actually going out to see the Salt River Pima folks tomorrow.

Mr. HAYWORTH. Well, you timed it pretty well. It is always beautiful in the Fifth Congressional District of Arizona. Next month with spring training might be optimal, but we are glad you are going.

[Laughter.]

Mr. HAYWORTH. We are glad you are going to make the sacrifice, Jim, and go out tomorrow.

Mr. CASON. Thanks.

Mrs. CUBIN. [Presiding.] Thank you, Mr. Hayworth.

Mrs. Christensen, you are the next one in line to speak.

Mrs. CHRISTENSEN. I am the next one—

Mrs. CUBIN. The Chair recognizes—

Mrs. CHRISTENSEN. Thank you, but I don't have any questions. I am here—this is an issue that has gone on for far too long. I think my Ranking Member has asked most of the pertinent questions and I am just going to listen this morning. Thanks.

Mrs. CUBIN. Mr. Faleomavaega, you are recognized for five minutes.

Mr. Faleomavaega. Thank you, Madam Chairman. I do want to thank Mr. Cason for his testimony.

Madam Chairman, this issue has been here as long as I have been a member of this committee. I know that Mr. Cason's heart is in the right place and we are all trying to make attempts to resolve this thorny issue. I don't want to risk being somewhat repetitive of all that has been said, but only in the sense of perspective for all the years that I have been listening and attending hearings and doing all of this, it is frustrating as heck.

Mr. CASON. It is.

Mr. Faleomavaega. Given the fact that these funds are not the American taxpayers' money, these funds belong to the American Indians and the tribes—it is their money, not ours, and now we are about to expend about a quarter-of-a-billion dollars here for the

simple administration of the funds that belong to them in the very first place.

I think that as a matter of historical perspective, there have been attempts through proposed legislation to resolve the matter. There was one bill that seems to have had a lot of support from Indian tribes. Certainly now having our arbitrators, hopefully, this may be another possible option. I remember the time in the Clinton administration, all their stories aside, we had a new organization as an excuse for not really addressing the issue. I remember that we appropriated initially \$20 million for an attempt to conduct an audit, a total waste of money because when the audit was conducted, they said we can't even start in base one even to begin auditing. It was a total impossibility. But we have spent \$20 million, and then we spent probably even more monies now than ever.

But I want to ask Mr. Cason, I have been simplistic in my simple resolution, or solution. Why don't we just give them \$4 billion for starters and negotiate the rest that is where we have had the problems? I know there have been estimates, the trust fund is probably up to \$8 to \$10 billion. Probably when figures come back, they said, no, no more than \$2 billion. Why don't we find a happy medium that says, well, let us start with \$4 or \$5 billion. My gosh, if we can afford giving \$182 billion to fight the war in Iraq, I simply cannot understand why we can't give \$4 billion of their money.

This money does not belong to the American taxpayer. It belongs to the Indians. Why can't we just fund it from the Treasury. Give them \$4 billion to start. Let them start benefiting from the money that belongs to them and negotiate the remaining that is in question, which seems to be the problem that we are having.

I know I am being simplistic, throwing the figures around like that, Mr. Cason, but when you say we have to start from square one, my gosh, it is going to take another 100 years before we can find a plausible audit. It is totally impossible even to conduct an audit.

So I am somewhat very puzzled on how this is going to continue, but we are spending \$230 million-plus on a yearly basis to set up this whole new organization within the administration to operate or to do a better job and see that the monies are properly accounted for. So I am a little puzzled by all this, Mr. Cason, and maybe you could help me out. What exactly is the status of our 2M accounts? Where are we with that?

Mr. CASON. Congressman, you offer a perfect illustration of the problem. Part of trying to get to a resolution of this issue is trying to figure out where there is a real error. The Department's policy, the administration's policy, I think everybody in government, is if we know there is a real problem with an individual's account or even a tribal trust account, we ought to be willing to step up to the plate to address that specific problem. But the issue goes back to what I talked about before, which is expectations and uncertainty. What exactly is it we are trying to do?

And to illustrate on the numbers, if we took the results of the accounting that we have done so far, and we have four of the five largest accounting firms in the country hired to work on this using accounting standards that they have all adopted commonly, and they have been looking at the account, so it is not Interior

employees looking at it, it is accounting firms looking at the accounts, if you take the results of that, the errors that we have found are few and infrequent, tend to be small, and tend to balance out close to zero. We have made overpayments to Indians. We have made underpayments to Indians. And there are a few errors, there is no question about that. But if we were projecting based on what we know so far how much we would be on the hook for, it would be in the relatively low millions.

The plaintiffs, on the other hand, have made a bunch of public statements that says there is \$176 billion that is owed, and you used the figure of \$4 billion. We have heard \$40 billion, \$60 billion, \$2 billion, \$500 million. We have used from time to time, well the cost of our accounting is \$335 million. Why don't we just give it to the Indians instead of paying lawyers and accountants to do this.

So part of our problem is what is the magnitude of the error, because there is no evidence on the table that I know of that actually quantifies the error that is owed to the Indians, their money.

Mr. Faleomavaega. Mr. Cason, if my memory serves me right, in briefly discussing the matter of Ms. Cobell and those who brought the litigation before the courts, they were not talking about \$160 billion owed to the tribes. I think the range, as I recall, was somewhere between \$6, \$7, \$8, \$10 billion at the most. But \$160 billion, now, I may be wrong, but I am saying to you, my recollection was that they wanted to negotiate in that range at least for starters. So give them at least a base to start benefiting from their own money.

But now that I hear that the range has gone up to \$160 billion, this is the first time that I have ever heard that statement.

Mr. CASON. These are numbers that we have seen in the press. Whether that is a clear reflection of actual intent or not, I don't know. Keith is here. You can ask him. We have just seen these figures—

The CHAIRMAN. [Presiding.] If the gentleman would yield for just a minute, I know that—

Mr. Faleomavaega. I apologize for the added time.

The CHAIRMAN. I really don't want to negotiate this in the middle of this hearing.

Mr. CASON. That is great.

The CHAIRMAN. I understand Mr. Faleomavaega's frustration. I think we all share it. I have had the same conversations. But if at all possible, I really don't want to negotiate this in the middle of this hearing.

Mr. Faleomavaega. Mr. Chairman, if you would yield, I was not trying to conduct a negotiation, but I do want to say, Mr. Chairman, that I really want to thank you for calling this hearing. It is not only appropriate, but I sincerely hope that in this Congress, that we will make every sense of commitment on our part to finally find some sense of resolution to this problem and I thank the Chairman for giving me more than the time that I requested. Thank you, Mr. Cason.

Mr. CASON. Thank you.

The CHAIRMAN. Mrs. Cubin, did you have questions?

Mrs. CUBIN. Mr. Chairman, I don't really have a question. I just want to express my frustration along with the rest of the

Committee. This is just preposterous that this issue has gone on for so long and we are no closer to a solution than we are. I urge you to work—and Mr. Chairman, anything that could be done from this end, I urge us to move in that direction. Thank you.

The CHAIRMAN. Ms. Herseth, questions?

Ms. HERSETH. Thank you, Mr. Chairman. I apologize for missing the first part of your testimony, but a couple of questions as it relates to the need for historical accounting. But let me go first to elements of the Court of Appeals decision.

Although the D.C. Circuit Court of Appeals found problems with some of the remedies that Judge Lamberth imposed on the Interior Department, many of his findings still stand. In one of the decisions, it stated that, quote, “It would be difficult to find a more historically mismanaged Federal program than the individual Indian money trust. It is fiscal and governmental irresponsibility in its truest form.”

Was creating the Office of Special Trustee a failed approach, in your opinion?

Mr. CASON. No.

Ms. HERSETH. What do you need from Congress in order to finally implement a real solution to the problem?

Mr. CASON. To the historical accounting problem?

Ms. HERSETH. To be able to, as everyone that I have heard from thus far has indicated, the frustration that we have had over the number of years on a number of different elements of the accounting. Do you agree that an historical accounting has to take place and that it is critical to determining what is owed?

Mr. CASON. I think it is very beneficial to gain information from which we can all become informed, and then with the information, we have a better understanding about what the real problems are. I think that is helpful.

But as I mentioned earlier, I am concerned that even if we do a lot of accounting work and spend hundreds of millions of dollars on accounting work, that in the end, whatever the results are, they won't satisfy the expectations or concerns of all the parties that are involved.

So I think it would be preferential if we can find a way to solve the problem in some sort of Congressional settlement to lay out, here is how we are going to deal with the issue. This will be the end of the issue. Congress is the set lord of the trust and Congress can lay out, here are the terms that we are going to manage the trust under, and I think in the end, that will be a preferential solution.

If not, we can continue down the historical accounting path and gain more information over time that all of us will be better informed with.

Ms. HERSETH. Do you feel it is critical in the process?

Mr. CASON. I think a certain amount of accounting was critical of the process, but I don't think it is ultimately going to be a solution.

Ms. HERSETH. But how do we go forward without some sort of accounting?

Mr. CASON. We are actively engaged in the accounting now. Congress has been funding historical accounting activities for the last

several years. We made great progress on doing historical accounting. We have basically gone through tens of thousands of accounts in the judgment per capita area. We are working on land-based accounts now.

So the issue is, how exactly do you define an accounting? If we are doing process, how do you define exactly what an accounting is, because we and the plaintiffs have very different views, or we and the District Court have very different views about the level of work and effort and financial commitment it takes to do an accounting. So that needs to be resolved if we pursue a historical accounting process approach.

So it is a matter for this Congress to help us decide how we do that, and either we are going to get that instruction in the form of authorizing language or we are getting the instruction now and through appropriations as to the level of effort that we can put into historical accounting.

Ms. HERSETH. In my remaining time, I would just like to commend, as others have done, Chairman Pombo for calling this hearing, but just for the benefit of everyone here, a last comment I would like to make. It is important to remember that the Cobell litigation deals only with the individual Indian account holders. It doesn't address the billions that the sovereign tribes are owed for the management of their assets and I think it is important going forward, as you have mentioned, with the authorizing language of the appropriations that we keep this in mind and recognize the billions of dollars that are owed to tribes for mismanagement and abrogation of responsibilities by the Federal Government under the various treaties with treaty tribes in South Dakota and other tribes throughout the country.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Gibbons?

Mr. GIBBONS. Thank you very much, Mr. Chairman. I apologize myself for being late due to other commitments.

I wanted to ask just one—start off with one question and see where it leads. I would like, Mr. Cason, for you to tell me why it is going to cost so much to audit all of these accounts.

Mr. CASON. In large part, Congressman, it is due to the level of work that it takes to audit the accounts. If I can use it as an illustration of the level of work, in just the electronic era, 1985 to now, and that is electronic era for the Department of Interior, where we have managed the accounts with computers, that we have somewhere on the order of 55 million transactions that have occurred during that period of time. Depending on how much work you do to reconcile the accounts, if you go on a transaction-by-transaction basis, you have 55 million transactions for which you have to go to the underlying documentation, pull all that documentation up, and ensure that it is all consistent with what was entered on the ledger. That is a very, very expensive process to do.

If you go even further back in time, as was directed by the District Court decision in the structural injunction, the District Court basically said, reconstruct all the transactions back to 1887, and the further back in time you go, the more progressively expensive it gets and more difficult it is to pull records for that period of time.

We have a substantial records data base. It is on the order of 600 million pages. We have over a terrabyte of electronic information that we can bring to bear on the problem. We have found that as we have done the accounting, in large part, we have a substantial records data base to do the accounting, but it is not perfect. To organize the materials and to actually do the accounting is a very expensive process just because of age and volume of the work that needs to be done.

Mr. GIBBONS. How long do you expect this process to take?

Mr. CASON. It depends, Congressman, on the definition of what we have to do. If we followed the plan proffered by the Department of Interior, it is about \$335 million and about five years. If we followed the District Court's structural injunction approach, it could well take a long time, maybe even decades because it is a huge volume of work to do, the way it was structured by the District Court.

Mr. GIBBONS. If you followed the court's direction and go back to 1887 or whatever timeframe they dictated to you, what changes in the cost or what changes in the outcome would you expect?

Mr. CASON. I think the fair answer is until we actually do the work, we don't know, and I think that would be fair. What we have so far is we have spent about \$100 million on individual accounting, and in large part, we are starting with current and working our way backwards. So there is the possibility that we find some errors that are older than where we have been so far. So it may end up resulting in significant findings of errors, but we haven't found that so far.

The accumulation of the accounting that we have done so far would suggest that the systems are reasonably accurate, but it hasn't tested the whole range of possible options. So at this point, in fairness, we don't know until we do it.

Mr. GIBBONS. The answer you have given suggests that there has been a very poor process of accounting for all the funds, the trust funds, et cetera, in the timeframe going all the way back to what the court dictated was the time you should be starting your accounting from. Is that your initial determination so far, that there has been serious flawed accounting in handling of these trust funds?

Mr. CASON. No. Actually, I think what we have found is that, over time, these accounts were, in large part, kept by fellow Indians as members of the Bureau of Indian Affairs. As close as I can tell so far, they were diligent in doing their work to try to accurately record the transactions involving their brothers and sisters and fathers and mothers, et cetera.

Does it mean that there are not any errors? No. We have already found some errors in the process that we are doing, but they tend to be small and they tend to be infrequent. Is it possible that we will find at some point in the future some issue of systemic fraud in the accounting system? It is possible. We haven't found that yet. But we haven't arrived at a conclusion that despite all the public rhetoric about how bad the Department was or how bad Indian Affairs were, we haven't found that it has had a major impact to result in major issues of lost or stolen revenues. So we are still looking at the issue, but we haven't found that sort of thing.

Mr. GIBBONS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Udall?

Mr. TOM UDALL OF NEW MEXICO. Thank you, Chairman Pombo. I first just want to compliment the Chairman on holding this hearing because I think it is very important that we are dealing with this issue at the level of the Resources Committee rather than having the Appropriations Committee through its process try to legislate. I know that the Chairman has worked very diligently to see that the legislation on this issue is done in this committee rather than Appropriations, and I very much appreciate that.

Mr. Cason, thank you for being here. Let me first ask you, is there a solution that you can give this committee? I apologize for not being here earlier, but it seems to me that the administration, when they are in a lawsuit like this, should be in the position to be able to come forward and tell us if they think we should be doing anything legislatively in this committee rather than going around this committee and going over to the Appropriations Committee and asking for riders in the Appropriations Committee to do things that you want to do. If you have a legitimate solution, you ought to be willing to lay it out on the table for us, and it seems to me in the course of mediation, or negotiation or all the process that you have gone through, you have to be willing to lay it on the table with the plaintiffs and try to come up with a solution. Do you have a solution you can recommend to us?

Mr. CASON. At this point, Congressman, we haven't determined a specific solution to this. We have evaluated a number of possible options to address this. Some of them are process options. Some of them are settlement options. Some of them are partial options and some of them are ones we call total peace, where we try to deal with not only this particular issue, but the underlying causes of the issue.

So we have looked at a number of different ways of approaching this problem, but at this point, and we view this as a constructive dialogue opportunity with the committees of Congress to evaluate what the possibilities are and evaluate an acceptable course of action, which can either be a process solution or can be a settlement-type solution.

So we stand ready, the Department of Interior, to work with this committee and the committee in the Senate, Indian Affairs, to try and discuss those possible options and see if there is any course of action that appears to be appropriate and mutually acceptable.

There are ways to solve this problem, but it is going to take some decisionmaking, and what we have found so far, Congressman, is we in the Department of Interior, we are not in the decision role. It is ultimately going to be here in Congress, both in the form of authorizing language and in the form of appropriations language, that ultimately will be called for to solve this problem, in my view.

Mr. TOM UDALL OF NEW MEXICO. I beg to disagree with you. You all are litigating this case. You have the expertise. The Department knows where this should be headed and you should be up here asking us specifically, this committee, not the Appropriations Committee, this committee what it is you want to do and how you are going to work toward a solution.

I think it is unacceptable at this point to come in and be saying, "Oh, well, we are considering all of these things." This is a piece

of litigation that has gone on for years and years and years, and as my good friend here to my right from American Samoa has said, the Native Americans are the ones that are suffering as a result of us not coming to grips with this.

So will you promise me, rather than these patchwork, band-aid solutions where you go to the Appropriations Committee rather than coming to us, will you promise me you will come to us, this committee, rather than doing that kind of process?

Mr. CASON. Well, Congressman, I am here right now.

Mr. TOM UDALL OF NEW MEXICO. You are here, but I asked for a solution and you don't have one.

Let me ask you about this whole issue. I know there are lost records, completely lost records. What is the approach of the administration on the lost records? If an individual comes forward and says, I have an account. I understand that I am entitled to this much money. Are you taking the approach where there is a lost record that the burden of proof is then on the government to refute; or are you actually disputing and just saying, "Oh, we lost the record so we don't know anything about your account?" What is your approach on that?

Mr. CASON. I am not aware of a specific circumstance where an individual has come in and made a specific allegation of what they are owed with no records and then we have had to deal with it. We do have instances in which, during the normal accounting process that we are going through in response to the Cobell litigation that we do not find records, and we go through a process of attempting to find the records, and if they are not found, we simply record that as we haven't found the records and we don't give an implication to it one way or the other. We just say, the supporting documentation for this particular transaction, we haven't found. And so we make a notation of what we do find and what we don't find and we don't give any implication to it on one side or the other, that it is right or it is wrong.

Mr. TOM UDALL OF NEW MEXICO. I know my time is out, Mr. Chairman. Most of the time when the government loses the records, I think the burden should be on the government rather than the individual that comes forward, especially when you are dealing with fiduciary and trust responsibilities to Native Americans.

Thank you for your courtesies, Mr. Chairman. My time is up.

The CHAIRMAN. Before I recognize Mr. Walden, I would like to remind the Committee again that the purpose of this hearing is informational. I do not expect, and I promised the witnesses that we would not try and negotiate this settlement during this hearing. I know there is a great deal of frustration on the Committee, but it is unfair to the witnesses to expect them to negotiate a settlement in an open hearing at this time.

Mr. Walden?

Mr. WALDEN. Thank you very much, Mr. Chairman, and again, thank you for holding this oversight hearing on this very difficult and costly issue.

Mr. Cason, thank you for your testimony and for your work on this, along with those inside the agency and out who collectively are trying to come to a fair and equitable solution to this problem.

It seems to me, and I am no accounting major, but this kind of the equivalent of the Boston Big Dig. It just goes on forever, costs a fortune, and it seems like you never get to the bottom of the accounting problem. This accounting problem goes back more than 100 years, right?

Mr. CASON. Yes.

Mr. WALDEN. It just seems to me at some point, we are going to spend more trying to dig up all these records or recreate them than perhaps the settlement cost would be. Is that reasonable, or—

Mr. CASON. Congressman, that will depend on what level of effort Congress ultimately authorizes through appropriations. So far on doing the accounting for tribes, we have spent about \$20 to \$30 million. So far on accounting for individuals, it is around \$100 million. So we have had that level of effort so far.

Our request in 2006 appropriations is for \$135 million to continue our work in historical accounting. If we embraced what the District Court told us to do, the price tag is somewhere, our estimate, \$6 to \$12 billion to do that.

Mr. WALDEN. Just to do the accounting?

Mr. CASON. Just to do the accounting. And the estimate of throughput, and throughput is a concept of if you have your checking account for ten years, all the credits and debits you have had in your account, that is throughput, the estimate of throughput is about \$13 billion in the last 100 years. The current balance of the account is just over \$400 million. So it won't be very long following the current course that we have now that the accounting cost will exceed the balance of the fund, and then it will be a matter of just how much level of effort we put into it before it is termed to be adequate.

Mr. WALDEN. Have you run a number, and maybe you said this earlier and I missed it, but the cost of the average claim, what they are owed, perhaps, versus what it costs you to get there? If you are an individual tribal member with a claim, what is that claim valued at, on average?

Mr. CASON. Congressman, we don't have an assessment of value of claims because what we are going through right now is the administrative process of conducting an historical accounting, and that is a process in which we assess the account, the activities in the account, and draw a conclusion about whether the account is accurately stated. And then after that, if there are errors in the account, at that point, you could make a determination of whether a claim was appropriate or not.

So the litigation principally is focused on the administrative process, the arriving at an accounting of our stewardship of Indian assets, and then after that is done, we can determine whether a claim is appropriate and how to address it.

Mr. WALDEN. Maybe you can't answer this question, but I have tracked this e-mail issue and the judge's decision clear into little old Lake View, Oregon, among other places, where BLM and the Forest Service cohabitate in the same building and yet they can't communicate, or couldn't for a while. Even though they were next door to each other, they had to get up and walk around and talk instead of e-mail.

Can you tell me what the logic of that was from the judge?

Mr. CASON. I can tell you what the court has suggested. Basically, what is at issue is a concern voiced by the plaintiffs to the court that our IT systems that contain individual Indian trust data are not secure. That is the issue. And the judge has agreed, and the remedy the judge imposed was to order the Department to disconnect any system in the Department of Interior that contained IITD, or Individual Indian Trust Data, from the Internet as the means of reducing the risk to that data that might be used for historical calculations.

Mr. WALDEN. How did that lead, then, to a complete shutdown of e-mail? Couldn't that be walled off pretty easily?

Mr. CASON. The problem that we had is imperfect information at the beginning, that when we initially got the order on December 5 of 2001, we didn't know exactly where all Indian data was in the Department.

Mr. WALDEN. I see.

Mr. CASON. And so we had to go through a process—we had to shut everything down to comply with the order, go figure out where all the information was, and then progressively petition the court to let certain systems up that didn't represent a risk.

Mr. WALDEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Pallone?

Mr. PALLONE. Thank you, Mr. Chairman.

I just wanted to ask Mr. Cason—well, first, let me say that it continues to bother me, and I have to, before I ask my question, say that the idea that the Department continues to move forward with this BIA trust reform without really having any consent or consultation with Indian country, in my opinion, or any real input, in my opinion, from this committee is not—I don't appreciate that and I think it is an ongoing problem.

But more important is the fact that it just seems to me, when we look at the Federal budget, that in order to fund the Office of the Special Trustee, we are constantly offsetting that funding with cuts in other Indian accounts. I am not even going to ask you, because you will tell me that that is not the case, but it is clear to me from last year's budget as well as this year's budget that, for example, the BIA School Construction Fund is being cut in order to offset, in my opinion, the OST funding.

But what I wanted to ask, is the administration doing this, and are they increasing taking money away from these other existing Indian programs in order to force our hand or impose some kind of a settlement? I think that what is happening now is that the tribes are feeling very strongly that as long as you continue with your efforts in this reorganization, that less and less money is going to be available for other Indian accounts. I mean, is that some sort of concerted effort to tell us, impose a settlement, otherwise these funds are going to continue to be diverted? Just answer that, if you would.

Mr. CASON. Not at all.

Mr. PALLONE. If that is not the case, I know you have given us some figures here, and I wasn't here before when you spoke, but have you indicated when this reorganization is likely to be completed or what the overall cost is going to be in the long run?

Mr. CASON. Congressman, it is substantially complete now. We are still in the process of hiring a few people to fully staff it. This is an issue where we actually agree with the plaintiffs in the Cobell lawsuit that the Department had not done a good enough job in managing the trust with people who were qualified to be trustees.

Mr. PALLONE. About how much more do you think it is going to cost us, and when do you expect it to be done? Can you give us a date?

Mr. CASON. The reorganization stuff, as I said, is substantially done. To the extent of my knowledge, if anything, there are just small items that have to be done. We are hiring, in some cases, deputy agency superintendents for trust, in some cases—

Mr. PALLONE. Another six months?

Mr. CASON. I don't know. The personnel process is one that it is hard to gauge when everything will be done because you gain people, you lose people through normal attrition—

Mr. PALLONE. Well, give us a date. A year?

Mr. CASON. I don't know, Congressman.

Mr. PALLONE. All right. What about—

Mr. CASON. It is an ongoing process.

Mr. PALLONE. How much more is it going to cost us?

Mr. CASON. I think it is built into the Congressional budget, the 2006 budget right now. The staffing that is associated with it is relatively nominal. Out of an organization of 10,000 people, we are talking about a relative handful of people that would be placed in these new positions that haven't been there before. And all of it, the intent is for us to have people who are directly focused on how we manage the trust, to act as a trustee.

Mr. PALLONE. I don't doubt that your intentions are proper, but my fear is that you run the risk of implementing this plan that could ultimately be rejected by the court and then you have wasted millions of taxpayer dollars. What is the answer to that? What happens?

Mr. CASON. Well, at this point, we have an ongoing dialogue with the court about how we resolve this issue, and we have been there in that dialogue for nine years. In the course of this, it has been in the District Court and the Court of Appeals several times—

Mr. PALLONE. So you don't think there is a risk that ultimately you do all this and they just say, well, that is not acceptable, and then you wasted all this money?

Mr. CASON. I suppose that is possible, but I guess I don't envision the court really stepping in to say, you know, you shouldn't have any trust officers involved in this business. Having people who actually focus on managing this like a trust is important. So I guess I don't really envision that being an issue.

Mr. PALLONE. Let me just ask one more question. I know cost is the fact you keep raising with this historical accounting, but if it wasn't for the cost, and I guess you can't really rule that out, but if it wasn't for the cost factor, would the Department be able to do an accurate historical accounting? I mean, are the documents destroyed? Are they there? If we just left out the cost for the time being, would you actually be able to do it, or the documents aren't there and are destroyed and you just couldn't do it?

Mr. CASON. Congressman, I think that depends on your expectations to answer, and what I mean by that is if your expectation is that we have every single document ever created to describe what we did in the trust since 1887, no, you couldn't. But if your purpose is to become much more informed about what the Department did as a trustee over this last 100 years, yes, we can.

What we have found so far in the accounting, and we have done accounts from 1914 forward, not a lot in the older ones, a lot of accounts in newer accounts, we found that generally we have somewhere between 85 and 95 percent of the documents for credits and debits. There are missing documents, there is no question about that. There is missing information. We wish we had everything. We don't. But we think that we can become substantially informed about the activities in these accounts and the status of the balances in these accounts with the records we do have. But it is very expensive and it is very time consuming to do.

We have been at this for nine years, and at the end of nine years, Indian beneficiaries don't have anything different than they had nine years ago other than we are producing pieces of paper that says, here is what happened in your account. And what we would like to see if we could do with the help of this committee and Senate Indian Affairs is see if there is another pathway we can pursue to find a settlement to this that is fair and equitable to everyone where Indian beneficiaries actually end up benefiting from the process instead of lawyers and accountants.

Mr. PALLONE. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Pearce?

Mr. PEARCE. Thank you, Mr. Chairman.

I think the testimony of the gentleman, Mr. Harper, to follow declares that there are ongoing and profound mismanagement of the trust assets. I think your words were that your errors were small, infrequent, and have no systematic faults in them. Have you been given information that would lead you to believe that the attorneys on the other side have found this ongoing, profound mismanagement?

Mr. CASON. Well, clearly, Congressman, as has been asserted often, we are in the process that, at this point, we don't know that it has ever been a huge mismanagement issue. It has clearly been asserted. It is a popular lore. But we are going through the accounting process and what we have discovered so far in accounting, we haven't found that. But the accounting has a long ways to go if we keep going down that path.

Mr. PEARCE. Also on that same page of the other testimony, it says that it is often a matter of life and death. I mean, this is a pretty serious allegation. Have you been given the information that showed you it is a matter of life and death? This is a very, very serious allegation.

Mr. CASON. It is a serious allegation, Congressman, and what we have right now, today, is an accounting system that we balance to the penny. We know every day how much money is in each individual account. We have processes for paying out the money that is in the account if it is an appropriate thing to do. We have some restricted accounts where it is not appropriate to pay it out. But we get the money in and out the door and we send it out to

beneficiaries. So to the extent that people are depending on the money today, we do that.

The issue here on historical accounting is did the Department of Interior mismanage funds in the past sometime that could have potential implications to somebody today, and that is the issue we are exploring under that historical accounting program to see if we can actually find that.

Mr. PEARCE. Is there anything in your findings so far—to try to relate this to me personally, I don't work so well with numbers, but let us say that I had a \$50,000 house, and if I wanted to equate the value of that house—I understand the level of trust, the IIMs that you are managing is \$400 million.

Mr. CASON. That is the relative balance, yes.

Mr. PEARCE. And the low level, the low threshold of solution is \$13 billion to get me from \$400 million, if we assume that 100 percent damage has been done on \$400 million, to go from \$400 million to the low level, \$12 billion, requires a multiple of 30.

So relating that back to my deal, if I have a house worth \$50,000, the low-level claim is that I am going to be recompensed, I will be given value of \$1.5 million for my \$50,000 house. And if we move to the upper end of the settlement, then you would have to add a couple more zeros to where my \$50,000 house is now worth \$15 million. That tells me that they are accusing you of pretty dastardly things and life and death issues. But you say they haven't produced those for you.

Mr. CASON. Well, I think the allegations are clear and they are pervasive. What we are attempting to do is gather the information, allows us to determine whether the allegations are substantive.

Certainly, the thought process that BIA has mismanaged accounts in the past, there are allegations against Indian superintendents from way back when that they committed fraud. There is lots of stuff that you can go take a look at that would lead to a perception like this. And all we can do right now is try to get the facts and then talk about how we can resolve the issue in a different way.

Mr. PEARCE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Inslee?

Mr. INSLEE. I thank you. First, I want to thank the Chair for holding this hearing.

I have two kinds of areas of inquiry. First, this issue of how the Department intends to pursue working with Congress on this issue. Last year, my perception was there was just an end run around the committee of jurisdiction and a last-second attempt to stick something in the appropriations bill as a rider, which I didn't think ultimately was going to be a successful way of doing it even if it was perfect, given the nature of the effort. Was the Department involved in that? What is your intention in the future in terms of this?

Mr. CASON. Well, on the issue of the appropriations rider, I do not know—well, let me start with me. I was not involved in writing the rider. I do not know the Departmental employee that was involved in writing the rider. It is my understanding that was an initiative on the part of the Appropriations staff because we had a District Court decision that suggested that we needed to get a

historical accounting done in three years. Our budget estimate is we were going to need \$2 to \$3 billion in year one in order to try to meet the court's decision and that the Appropriations Committee wasn't entirely convinced they had that amount of money laying around. So they tried to put a hiatus on it to see how things could work out. That is my understanding.

In terms of trying to resolve the issue, it does need to be resolved. We have been at this for nine years and we are not really making real material progress. We are doing lots of to-ing and fro-ing, but we are not making real material progress, and there are damages associated with taking so long to do this.

So we would very much like to get it done and the real issue again is the level of uncertainty that is associated with this and the lack of information and managing expectations. So when the expectations are this wide, and for the record, my hands are way far apart, when the expectations are wide and you don't have what appears to be common ground, that is where we really need some help from Congress to lay out what would be fair under the circumstances, because certainly the allegations are there. The expectations are there. The uncertainty is there. And the only way we really resolve materially the uncertainty is plow a bunch of money into historical accounting and it will take a long time, which may in the end yield no material results.

On the other hand, we can speed the process up with some kind of a settlement if we can figure out what is fair to deal with this issue and then try to resolve it so Indian beneficiaries actually benefit from the process rather than lawyers and accountants. That is where we are.

Mr. INSLEE. Not without this committee, you can't do it. At least, that is our view from this side of the table.

Mr. CASON. That is exactly right. That is why we are here.

Mr. INSLEE. Second question, it was pointed out in something I was reading about the difficulty of settlement in taking into consideration the non-individual claims, the tribal claims themselves. It was pointed out that the plaintiffs in the lawsuit don't have authority to dismiss or release any claims by tribal entities themselves.

Mr. CASON. They don't.

Mr. INSLEE. Have the tribes been involved in those discussions? Is there a role to bring them into the discussions? What is the status of that?

Mr. CASON. If I recall correctly, Congressman, we have on the order of 22 or 23 lawsuits from tribes that have similar characteristics to the Cobell lawsuit. They are seeking a historical accounting or alleging historical mismanagement. There is a separate division of the Department of Justice that works on those. It is the Energy and Natural Resources Division. They are actively engaged in conversations with the tribes on their individual lawsuits. I know that the historical accounting budget, some of the money is designed to do additional accounting work for tribal accounts, just as we have money for the individual accounts.

Mr. INSLEE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman. I appreciate your giving us the opportunity to question you and be educated by asking questions. But I do want to echo the sentiments of Mr. Hayworth. To allow and encourage self-governance of the money by the Native American tribes themselves is a desirable outcome.

But I have a number of questions, and part of it comes from my judicial background, as a former trial judge. First of all, have the claimants been allowed to do discovery of the accounts so they could do their own account?

Mr. CASON. I don't know that that is the case. The plaintiffs have filed a class action lawsuit and there were five members of the representative class. As I understand it, one dropped out. We have four of the original members left, and the plaintiffs are representing the class of current and former account holders. So I don't know that they have tried to do any individual accounting on their own. I know they have done some modeling, and I am sure Keith, the next witness, can tell you about that.

Mr. GOHMERT. With regard to the funds themselves, did I understand you to say there are \$400 million in current funds?

Mr. CASON. The balance varies from day to day, but approximately, there is a balance of \$400 million in the individual accounts.

Mr. GOHMERT. And as far as in the discussion about numbers, as I understood, we were talking in terms of \$2 billion, \$4 billion with a "B", \$10 billion, and possibly even up to \$160 billion, and yet you say you found nothing but small errors.

Mr. CASON. That is what we—

Mr. GOHMERT. Where is the difference in the \$400 million and getting up to the billions?

Mr. CASON. Congressman, that is in the area of the uncertainty that we have. If you take a look at the job overall for historical accounting, we have an issue where the Department did not provide, periodically or systematically, accounting statements over the last 100 years. So over that last 100 years, you have an area of uncertainty because the statements weren't provided or developed, and what we are being tasked with now as a result of the lawsuit is to basically go back and recreate 100 years' worth of history, and that is very expensive to do. There are millions and millions of transactions that have occurred over that time—

Mr. GOHMERT. No, I understand all that. You covered that very well and I am clear with that. But as far as the difference between \$400 million and even talking in terms of billion with a "B"—

Mr. CASON. I think that is all a reflection of uncertainty.

Mr. GOHMERT. OK. You talked in terms of litigation having gone on for nine years. When is trial set?

Mr. CASON. We have been through several trials so far in the course of this. There has been an initial trial on historical accounting. We have had trials on contempt of the Secretary. That has gone to the Court of Appeals. We have what is called a 1.5 trial on how historical accounting ought to proceed. That went to the Court of Appeals. We had a trial on IT security. That went to the Court of Appeals. So we have been through a lot so far.

Mr. GOHMERT. But as far as a trial that will ultimately resolve the whole question of if there is liability and how much—as I understand it, that is what this is all about, right?

Mr. CASON. Well, I think that is a question that Keith would be able to answer better as an attorney. It is my understanding that the issue in the District Court is basically an APA proceeding or a proceeding designed to get an accounting. The District Court is not in a position to actually assign damages, that that would have to go to the Court of Federal Claims, but Keith would be able to say that.

And let me just correct one thing. When I say there was a trial on IT security, that is not accurate. We have had lots of to-ing and fro-ing in the court about IT security, but there has not been a specific trial on that, though the issue did go up to the Court of Appeals.

Mr. GOHMERT. Just in closing, let me just commend to you when government doesn't understand what fiduciary means, and I hope that people are being adequately educated, when it is a fiduciary, there is a higher duty than just the normal government, let us manage and get by. It is a very high duty that is required of them.

You had said earlier that also there is hesitance or disincentive for employees to become involved with anything to do with this lawsuit, and I would encourage you to create an atmosphere and educate to the point that where there is great risk, there is great opportunity, and anybody who wants to move up in their respective positions, this is a great opportunity, and I hope that would be the tenor of things so that we can move toward a resolution and get this resolved, people can move up and do well to help get it resolved.

Thank you very much for your time.

Mr. CASON. Thank you, Congressman. I use the word “opportunity” frequently, too.

The CHAIRMAN. Mr. DeFazio?

Mr. DEFAZIO. Thank you, Mr. Chairman.

Just one question. We struggle here, I think, given the fact that ultimately, the government is responsible to understand what the potential magnitude of liability or damages is. There is this one number that jumps out at me in the testimony of Mr. Harper and I just want you to reflect on that.

He says, this is—the pages aren't numbered, but it is in his testimony—“we note on this point that defendants' contractors have estimated their liability up to \$40 billion.” His footnote says SRA International, Inc., risk assessment at 5-1, 2002. Could you give us some idea what that figure means to you and how you think the government, apparently an entity contracted by the government, got to that number?

Mr. CASON. Yes, I can tell you what I think about it. The SRA was a contractor we had on board to work on our IT security issues and assessing BIA's computer systems. My guess is that they did absolutely no independent evaluation and that this was part of the public rhetoric that they adopted and stuck in their document.

Mr. DEFAZIO. So the government would pay for that kind of shoddy contracting work, that we would just have someone who

reads the newspaper and sticks something in a report and we pay them for it?

Mr. CASON. They were a contractor at the time.

Mr. DEFAZIO. And they were dismissed? Their contract lapsed? What—

Mr. CASON. The services that were needed under that contract were completed.

Mr. DEFAZIO. And were they paid in full for their services?

Mr. CASON. I don't know that for sure.

Mr. DEFAZIO. That statement is—I mean, it is carefully worded, I mean your response, but, I mean, that causes me another level of concern, that who we are contracting with to help get at some of these problems, if they are providing such shoddy services. That wasn't very helpful, but thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Cason. We are going to dismiss you. We have one vote on the floor right now. We are going to temporarily recess the hearing and come back and hear from our second witness.

Mr. CASON. Thank you, Mr. Chairman. Thank you, Committee. [Recess.]

The CHAIRMAN. The hearing is called back to order. Panel two is up next with one witness, Keith Harper of the Native American Rights Fund. He is on the attorney team representing the class of plaintiffs in the Cobell lawsuit.

Mr. Harper, welcome to the Committee. It is good to see you back.

STATEMENT OF KEITH HARPER, ATTORNEY FOR THE PLAINTIFFS, NATIVE AMERICAN RIGHTS FUND

Mr. HARPER. Good morning, Chairman Pombo. Initially, I want to just thank you for having this hearing and to accept our oral testimony on what we believe is one of the most critical issues facing Indian country and especially our clients, 500,000 individual Indians, individual Indian Trust beneficiaries. On behalf of those individuals and Elouise Cobell, I want to express my deepest gratitude for your sincere interest in efforts to explore a prompt and fair resolution of the Cobell litigation.

I am a member of the Cherokee Nation of Oklahoma and a senior staff attorney at the Native American Rights Fund and I represent the plaintiff class in this lawsuit. The case is presently before The Honorable Royce C. Lamberth, appointed to the bench by President Ronald Reagan in the District Court of Washington, Washington, D.C.

First, Mr. Chairman, I want to be absolutely clear on one point. There is nothing that Elouise Cobell, the other named plaintiffs, and plaintiffs' counsel would like more than an immediate and fair resolution of the Cobell case. A resolution to this century-old problem is long overdue. We are committed to finding a prompt resolution, one that is fair given the extraordinary mismanagement of Indian trust assets.

Again, Mr. Chairman, since inception, we have used every possible method to obtain relief for the class in the most expeditious fashion. We have pursued vigorously the case in every forum, including the courts and before the Congress of the United States.

The record is clear that we have not been the source of delay. Simply put, plaintiffs have no interest in prolonging this litigation.

Mr. Chairman, I have far more extensive remarks in my written testimony and I am just going to take a couple of those and highlight a couple of those for the Committee, in particular, start with the litigation and where we are.

The plaintiffs are in the process presently of implementing the two recent Court of Appeals decisions in this case, decided on December 3 and December 10, 2004. These decisions have provided important guidance as to the appropriate manner in which we are to pursue from here on out. I want to discuss a couple of critical points in that regard.

Importantly, the Court of Appeals held on the broad question of whether the District Court has authority to order appropriate relief to myriad specific identified breaches of trust, the decision held emphatically yes. The Court of Appeals categorically rejected the government's attempt to have the case dismissed on the flimsy ground that the case had, quote-unquote, lost its moorings. At the same time, the December 3 decision did vacate the trial court's injunction addressing the massive IT security problems, but on narrow procedural grounds, that the court did not have an evidentiary hearing prior to entering the injunction.

I want to say a couple of things about IT security because there have been many questions from members of the Committee. It is important to bear in mind that this problem has been admitted to by the Department repeatedly. In an order that they asked the court to sign that I have here, December 17, 2001, and which the court did enter, they provide—this is Interior defendants' statement—"Whereas Interior defendants recognize significant deficiencies in the security of information technology systems protecting individual Indian trust data, correcting these deficiencies merit Interior Department's immediate attention."

It is not a matter of whether or not there are IT security problems. They have admitted that in the record of the case. They created a Hobson's choice for the court. There is no audit trails. Anybody from anywhere around the country could go into the Internet and get onto these computer systems, change information, create their own accounts. That is what the report of the Special Master demonstrated.

At that point in time, the court had to ask itself, do I take measures to protect this data that is absolutely critical to ensuring integrity of the system, or do I leave it open? That Hobson's choice was created by the malfeasance of the defendants. So you have to put in context why the court acted as it did, and these admissions, I think, demonstrate the concern that we had in that regard.

I want to just touch on a couple of additional points. Mr. Cason talked about the fact that there were small errors in their assessment. The plaintiffs originally filed the motion to go to trial on the only basis for those, quote-unquote, "small errors," which is the Ernst and Young report. We don't believe it is in accounting. We believe it is riddled with errors. The appropriate way to address that is through a trial.

I just close by saying this. I end my written testimony with the 1915 report, and that report documents and talks about fraud,

corruption, and institutional incompetence almost beyond the possibility of comprehension. In 1915, a report before Congress on this issue. There is a long record of mismanagement and malfeasance. We have the opportunity now to resolve it. We would like to work with this committee to do so. Thank you.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Harper follows:]

**Statement of Keith M. Harper, Native American Rights Fund,
Counsel for the Plaintiff Class In Cobell v. Norton**

I. INTRODUCTION

Good morning, Chairman Pombo, Ranking Member Rahall and Members of the Committee. My name is Keith Harper, I am a member of the Cherokee Nation of Oklahoma, a senior staff attorney for the Native American Rights Fund, a non-profit law firm, and counsel for the plaintiff class in Cobell v. Norton, Civ. No. 96-1285 (RCL).

First and foremost, on behalf of Elouise Cobell and all our clients—500,000 individual current Indian trust beneficiaries of the Individual Indian Trust (“Trust”) (and all past beneficiaries), who are the owners of all the assets managed, administered and controlled by the government, we want to thank you for your sincere interests and efforts to explore a prompt and fair resolution of the Cobell litigation. Further, we are gratified that you have asked us to provide oral testimony on this critical issue facing Indian Country and it is our deepest hope that we can continue to work with you and your dedicated staff to ensure a just and fair resolution of this matter.

Before we discuss the subject of the oversight hearing—namely an update on the Cobell case—I wanted to make the Cobell plaintiffs’ position on one critical issue unmistakably clear: **There is nothing Elouise Cobell, the other named plaintiffs and plaintiffs’ counsel want more than an immediate and fair resolution of the Cobell case.** It is a matter of record that the government has mismanaged this trust for over a century. Cobell v. Norton has shed light on the gross mismanagement of this Trust and has raised this serious problem from the deepest and most secluded shadows of government bureaucracies to the light of day, where everyone can see the extraordinary injustice and abuse. A century of mismanagement is far, far too long.¹ A century with no accounting of trust assets is unconscionable and unprecedented. A century of harm to hundreds of thousands of this nation’s poorest citizens is inexcusable. And the harm done to the plaintiff class every day is unquantifiable and our clients suffer without abatement. This is often a matter of life and death. A resolution is long past due. We will work with whomever is capable of achieving a fair resolution. Moreover, we want to emphasize that this is not a new position. From inception, plaintiffs have sought expeditious resolution of this case. We continue to do so. We have been and presently continue to be willing to participate in any process that is reasonably calculated to lead to resolution of this case in an expeditious and fair manner—whether that be working with Congress for acceptable legislation, mediation, arbitration or continuing litigation. Simply put, plaintiffs have no interest in prolonging these proceedings.

While we are steadfast in our commitment to a prompt resolution of this case, we have an unconditional ethical obligation to ensure that any settlement is fair. We will, of course, vigorously resist “settlement” that allows pennies on the dollar to the beneficiary class and that fail to address meaningful on-going and profound mismanagement of their trust assets. It is our obligation as counsel to the class to work towards immediate settlement, while at the same time forcefully resisting any resolution that would further harm the beneficiary-class.

This hearing, as I understand it, is to update this Committee on developments in the Cobell case and to resume discussions on how best to achieve resolution and finality. Accordingly, I will provide this Committee an overview of developments in two separate components of this matter: litigation and mediation. In addition, I will discuss our views as to how to determine the most appropriate ways to find an acceptable settlement of the Cobell case.

¹ See, e.g., Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001) (“The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.”).

II. LITIGATION UPDATE

The Cobell case was filed on June 30, 1996. It is brought on behalf of all past and present individual Indian trust beneficiaries.² The Courts have rendered over eighty published decisions since the inception of this case. Because of the sheer volume of the record, plaintiffs present update necessarily will be truncated and discuss only the most critical decisions on the merits of the case essential to give a satisfactory overview of the litigation.

Plaintiffs seek a full accounting of our trust assets for the entire period that such assets have been held in trust—since 1887. After all, trustees, without exception, have a duty to provide accurate and complete statement of accounts to each beneficiary at regular intervals and a complete and accurate accounting upon demand. Yet, the United States has never provided an accounting to individual Indian trust beneficiaries. It has never provided beneficiaries accurate and complete statement of accounts. In addition, plaintiffs seek that the account balances of the Trust be corrected, restated and distributed to the correct beneficiary in the correct amount. Finally, plaintiffs seek reform of the trust management and accounting system, such reform will ensure that trust duties are discharged prudently and the government's liability does not continue to increase exponentially.

Plaintiffs have prevailed on the merits throughout this litigation. For the first five years, the government argued, among other things, that it did not have a duty to provide a full accounting of trust assets in conformity with generally applicable trust law. The government's position was repudiated by the district court on December 21, 1999.³ The Court held that the government is in breach of the trust duties it owes the plaintiff class and must render a complete and accurate accounting of "all funds."⁴ Defendants' attempt to limit the accounting to some "subset" of assets was expressly rejected by the district court.⁵

The government appealed this decision arguing that they could decide the nature and scope of the duty to account owed to individual Indian beneficiaries and that, in any event, the duty only required an accounting of funds in the trust as of 1994, when Congress enacted the American Indian Trust Fund Reform Act of 1994, 25 U.S.C. §§ 162(a) & 4001 et seq. On February 23, 2001, the Court of Appeals rejected these arguments and affirmed in all material respects the district court's order.⁶ The Court of Appeals explained that the normal deference shown to administrative agencies did not apply because this case involved a trust.⁷ The Court further held that the duty of the United States to account was not created in 1994. Rather the duty "inheres in the trust relationship itself" and therefore "preexisted" and was not dependent on the enactment of the 1994 Trust Fund Reform Act.⁸ Thus, the accounting must be of all funds "irrespective of when they were deposited."⁹ Finally, the Court held that because of the "magnitude of government malfeasance and potential prejudice to the plaintiffs' class," the district court had commensurately greater latitude to order appropriate relief for the identified breaches of trust and to ensure that the government was brought into compliance with its fiduciary duties.¹⁰ The United States did not appeal further this decision. Accordingly, the February 21, 2001 decision is a final decision.

Despite the clarity of the district court and appellate court's rulings, defendants have continued to resist providing plaintiffs the complete and adequate accounting to which the each beneficiary is entitled. Defendants have refused to take affirmative steps to bring themselves into compliance with their trust duties. Indeed, at every turn defendants have obstructed the proceedings and attempted to escape their plain legal obligations. It is because of this resistance and refusal to discharge their legal obligations that this case now approaches the end of its ninth year in the Courts.

²The class was certified on February 4, 1997.

³Cobell v. Babbitt, 91 F. Supp.2d 1 (D.D.C.1999).

⁴Id. at 41. ("Congress directed that the Secretary of the Interior account for all funds. The court cannot put a finer point on it than that.")

⁵Id.

⁶Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

⁷Id. at 1101 ("While ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, Chevron deference is not applicable in this case.")

⁸See, e.g., id. at 1103 ("Not only does the 1994 Act plainly reaffirm the government's pre-existing duty to provide an accounting to IIM trust beneficiaries, but it is plain that such an obligation inheres in the trust relationship itself."); id. at 1102 ("The 1994 Act reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust fund assets.") (Emphasis added).

⁹Id. at 1102.

¹⁰Id. at 1109.

Two recent Court of Appeals decisions further define the nature and scope of this case, and clarify the critical role of the Court in ordering appropriate remedies for the plaintiff class. In both instances, the government appealed injunctions entered by the district court. The first appeal, decided December 3, 2004, addressed the astonishing internet security deficiencies of the Interior Department computer systems that house and give access to critical information of the Trust.¹¹ The second was decided on December 10, 2004 and addressed a “structural injunction” that the district court had entered intended to compel the defendants to provide a historical accounting and commence true trust reform.¹² In the appeals, the government had sought outright dismissal of the Cobell case. Defendants argued, among other things, that trust reform was not part of this case at all, and that the case had “lost its moorings.”

While in both cases the appellate court vacated the trial court’s injunctions, it did so on narrow, largely procedural, grounds. More importantly, the appellate court categorically rejected the government’s argument that the Court improperly exercised jurisdiction over all aspects of the case. In addition, the Court rejected the government’s contentions that the highly deferential review standards of administrative law controls this case and that the district court could not grant appropriate relief for identified mismanagement and malfeasance.

Plaintiffs believe that these two decisions, taken together, provide a solid legal foundation to attain the relief we seek in this case and provide important guidance for the Congress as well. Certain principles emerge from these decisions that are important considerations in analyzing the current posture of this litigation and the potential ways to resolve the case. They will be discussed individually below.

1. *This Is a Trust Case and is Not Controlled by Administrative Law*

One of the government’s central arguments in these appeals was that the district court erred by applying trust law standards in a case that the government believed was controlled by the highly deferential review standards of the Administrative Procedures Act. In its December 3rd decision, the Court vacated the injunction on the narrow procedural ground that the Court should have instituted another evidentiary hearing prior to issuing the injunction.¹³ But on the wider question of whether the decisional law for the Cobell case was trust law or administrative law, the appeals court, quoting its 2001 decision, held: “Contrary to the Secretary’s view, “[w]hile the government’s obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms, and the narrower judicial powers appropriate under the APA do not apply.”¹⁴ The Court further explained:

The district court, then, **retains substantial latitude**, much more so than in the typical agency case, **to fashion an equitable remedy** because the underlying lawsuit is **both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties**. *Id.* at 1099, 1109. The Secretary’s suggestion that the appropriate role for the district court was confined to retaining jurisdiction and ordering periodic progress reports, as in *In re United Mine Workers of America International Union*, 190 F.3d 545, 556 (D.C. Cir.1999), ignores these salient considerations.¹⁵

In short, the appellate court resolved in plaintiffs’ favor that because this was an Indian case and a trust case, the court had far broader authority than in ordinary cases to remedy identified mismanagement and government breaches of trust. The December 10th decision of the Court of Appeals also noted “the availability of the

¹¹ Cobell v. Norton, 391 F.3d 251 (D.C. Cir. Dec 03, 2004)

¹² Cobell v. Norton, 392 F.3d 461 (D.C. Cir. Dec 10, 2004)

¹³ Cobell v. Norton, 391 F.3d 251, 256 (D.C. Cir. 2004). This injunction addressed the long-standing failure of the government to fix—in the Court of Appeals’ words—“gross computer security failures.” And contrary to some of Interior officials public comments, they have conceded the extraordinary deficiencies in of their easily accessible IT systems. During the same time-frame when the Court ordered disconnection of certain IT systems from the internet, Interior conceded that there were “significant deficiencies in the security of information technology systems protecting individual Indian trust data. Correcting these deficiencies merits Interior Defendants’ immediate attention.” Defendants’ Proposed “Consent Order regarding Information Technology Security” at 4. A couple of months later, Secretary Norton testified before this Committee and confessed in unequivocal terms that the “Departmental information technology security measures associated with Indian trust data lack integrity and are not adequate to protect trust data....” Testimony of Gale A. Norton, Secretary of the Interior, before the Committee on Resources, U.S. House of representatives, February 6, 2002, on Native American Trust Issues and the Ongoing Challenges, at 5 (emphasis added).

¹⁴ *Id.* at 257 (emphasis added).

¹⁵ *Id.* at 257-58 (emphasis added).

common law of trusts” but stated that trust law could not “fully neutralize the limits placed by the APA.”¹⁶ As a result, the Court refused to vacate the injunction in its entirety, but only those aspects that, in the Court of Appeals’ words, constituted an order “to obey the law in managing the trusts.”¹⁷

In sum, the Court of Appeals had narrow disagreements with the district court’s decisions regarding process, rather than broad disagreements over the district court’s authority. The appellate decisions recognized that the APA’s “narrow judicial powers” were not applicable and indeed, the trial court possessed “substantial latitude” to order appropriate relief to remedy identified breaches. Further, the Court of Appeals upheld Judge Lamberth’s broad authority to grant relief for the beneficiary class when specific breaches and management deficiencies are found and “ordering specific relief for those breaches.”¹⁸ Moreover, the district court was empowered to ratchet-up its remedial effort if there was further delay: “Interior’s malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate.”¹⁹

2. *There Exist Important Limits on Congressional Power to Interfere in This Litigation*

Mr. Chairman, as you are well aware, in the late fall of 2003, the Congress enacted the Interior Appropriations Act, P.L. 108-108. That law included a provision, commonly called the “Midnight Rider” that you and many members of this Committee opposed. The Midnight Rider was so dubbed because it was not a provision vetted through the authorizing committee of jurisdiction, this Committee, rather it was hastily snuck in to a conference committee report directly prior to enactment by the Appropriations Committee. The Midnight Rider is a prime example of why legislating on an appropriations bill is folly. While one of the stated purposes of the Rider by its sponsors was to provide a “time out” so the appellate court could review the trial court’s decision requiring a historical accounting be performed, the actual effect was to negate the appellate court’s ability to review the historical accounting part of the structural injunction decision altogether. Specifically, the December 10th appellate decision held that the Midnight Rider temporarily “removes the legal basis for the historical accounting elements of the injunction.”²⁰ By Congress doing so, the appellate court could not review the trial court’s historical accounting duty until after the Rider expired on December 31, 2004.

Rather than expedite resolution of this case, the Midnight Rider caused serious and irreparable delays. It is not an overstatement to suggest that the Midnight Rider delayed this case and relief for the plaintiff class for no less than three years.

There are a couple of important lessons that can be gleaned from this experience with the Midnight Rider. First, when Congress acts it must do so carefully. Hastily drawn riders without proper review through appropriate committees and hearings can have unintended consequences that dramatically impact the lives of people—here, 500,000 individual Indians. Second, while the Court of Appeals clarified that the Midnight Rider was constitutional, that was so only because of the temporary nature of the rider. Had the Rider completely eliminated the duty to account, it would have violated the Fifth Amendment Takings clause.²¹ Third, and perhaps most importantly, the appellate court acknowledged that Congress had some authority to address the accounting issue through legislation, but that it was obligated to “assur[e] that each individual [beneficiary] receives his due or more.”²² Put another way, any legislative alteration of the accounting duty that does not provide each beneficiary “his due or more” would necessarily be a taking of that individuals’ property and, hence, constitutionally infirm.

3. *The Government Owes Beneficiaries Interest and Imputed Yields*

In upholding the Midnight Rider, the Court of Appeals held that the provision did not constitute an impermissible taking because any delay would necessarily be compensable by the payment of interests or imputed yields. Specifically, the court held: “As trust income beneficiaries are typically entitled to income from trust assets for the entire period of their entitlement to income, and for imputed yields for any

¹⁶ Cobell v. Norton, 392 F.3d 461, 473 (D.C. Cir. Dec 10, 2004)

¹⁷ Id. at 475.

¹⁸ Id. at 477.

¹⁹ Id. at 478.

²⁰ Id. at 465.

²¹ Id. at 468.

²² Id.

period of delay in paying over income or principal, see G.G. Bogert & G.T. Bogert, *Law of Trusts and Trustees* § 814, pp. 321—25 (rev.2d ed. 1981)...”²³

The December 10th holding settles a longstanding dispute between then parties. Any money demonstrated not to have been properly credited to a beneficiary would require a correction of accounts for both “interest” and “imputed yields.” As a result a resolution of this litigation must be developed with consideration that this critical issue has now been resolved with finality.²⁴

4. *Where Do We Go From Here?*

Mr. Chairman, it is important to bear in mind that this litigation has gone on now for nearly nine years and a resolution is something we should all strive to achieve. But these nine years have not passed without substantial progress. Many of the most critical issues in this case have been resolved and in plaintiffs’ favor. There is a duty to account for all funds irrespective of when deposited back to 1887. Statute of limitations does not limit our claim. The government, as trustee, has been found to have breached its fiduciary duties. The Court can order remedies for specific breaches of trust identified through evidentiary proceedings. This is a trust case and therefore the “judicial powers appropriate under the APA do not apply.” We note too that more still would have been decided but for the unfortunate intervention of Congress in the form of the Midnight Rider.

This progress sets a critical foundation for plaintiffs’ continuing attempt to achieve equitable relief through the judicial process. Based on the decisional law in this case, we are presently pursuing two litigation avenues of which this Committee should be cognizant.

Mr. Chairman, as you are well aware, a central dispute between the parties is what is a fair amount for the aggregate restatement of accounts. We note on this point, that defendants contractors have estimated their liability at up to \$40 billion.²⁵ Plaintiffs believe that the number is well north of that figure. The government’s public position, however, is that they owe very little. They base this claim almost exclusively on the so-called “Ernst & Young Report.”

The government has long asserted that the Ernst & Young Report is a full accounting of the trust funds belonging to four of the five named plaintiffs and their predecessors in interest. Further, they allege, that because few errors were found by their so-called “accounting,” there should be a presumption that—despite the well-documented record of mismanagement and malfeasance—most funds reached the correct beneficiary. For years now, despite overwhelming evidence in the record showing the spectacular deficiencies of the Ernst & Young Report, the government has insisted it is an accounting.

For example, Associate Deputy Secretary James Cason testified, under oath, that the “E & Y Report” is an accounting:

As part of the Cobell litigation, Interior collected over 165,000 documents for the **historical accounting of IIM trust fund activity** through December 31, 2000 **for four of the named plaintiffs and 24 of their agreed-upon predecessors**. Of these documents, about 21,000 documents were used to support the transactional histories, which dated back as far as 1914, and which included a total of about 13,000 transactions. The **accounting contractor, Ernst and Young**, found 86 percent of the transactions and 93 percent of the funds moving through the accounts were supported by the documentation located. The cost of **this accounting** was over \$20 million.²⁶

Furthermore, under questioning from former Representative Brad Carson, Mr. Cason unequivocally confirmed the government’s view that the “Ernst & Young Report” is an accounting:

Mr. Carson: ... You said you did accountings for the five named plaintiffs in the Cobell litigation?

Mr. Cason: Yes.²⁷

²³ Id.

²⁴ Parenthetically, we note that the district court has already held that plaintiffs’ accounting is not limited by the statute of limitations, since it is well-settled that limitations do not begin to run until the trustee provides an accounting or repudiates the trust. See *Cobell v. Norton*, 260 F. Supp.2d 98, 107 (D.D.C. 2003) (applying general principle that “the statute of limitations does not commence running for a beneficiary’s equitable claim to enforce the obligations of the trustee until the trustee has repudiated the beneficiary’s right to the benefits of the trust”).

²⁵ SRA International Inc. “Risk Assessment” at 5-1 (2002).

²⁶ Transcript of Oversight Hearing on “Can a Process be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?”, July 9, 2003 at 12 (Prepared Statement of James Cason).

²⁷ Id. at 29.

The Secretary herself has similarly claimed the “Ernst & Young Report” is an accounting in trial before the district court:

Q. Ms. Norton, I’ve asked you this question twice and I would like to see if I can get a clear answer to the question. **Is it your understanding that the Ernst & Young report discharges the duty to provide an accounting to the five named plaintiffs** and their predecessors in interest?

A. My understanding is that is a huge amount of documentation of their accounts and I’m not aware of any way in which it is less than what would be considered meeting the appropriate standards. **So I would have to answer that in saying yes**, that would satisfy the level of scrutiny, and, you know, there may still be a reporting back to them has not formally been done.²⁸

Since the government has claimed that the “Ernst & Young Report” is an accounting, plaintiffs filed a motion on December 30, 2004 seeking a trial that would determine whether that accounting is adequate. Plaintiffs would like to test the validity of the government’s claim that this is an “accounting,” or as we have alleged, comes nowhere close to discharging their fiduciary duty to account. Trials are the ordinary manner to address such factual disputes.

But tellingly, defendants have opposed our motion. They now argue in their opposition to our motion that the “Ernst & Young Report” is not an accounting at all, but merely an “expert report.” Interior officials do not want the Court or anyone to make specific findings as to whether the “Ernst & Young Report” is an adequate accounting. The reason is self-evident. If there are judicial findings after the weighing of specific evidence that the “Ernst & Young Report” is not an accounting, the government would lose its main basis for claiming they owe little. The motion is fully briefed²⁹ and plaintiffs await a decision by the district court.

The Ernst & Young trial would be helpful for another reason. The Report cost \$23 million dollars for four beneficiaries. Thus, to do an Ernst & Young type “accounting” for the entire class would, by per capita calculation, cost hundreds of billions of dollars—an amount that is plainly ridiculous and excessive. Once plaintiffs establish that the Ernst & Young Report is not an adequate accounting—despite the excessive costs—the conclusion will be clear: An accounting is impossible. Therefore, as we have long stated, alternative methods consistent with trust law should be utilized to correct and restate account balances.

In addition, Mr. Chairman, plaintiffs have recently filed a request for a status conference to discuss with the Court how to proceed to an evidentiary hearing regarding IT security. Independent evaluations of the present IT systems of the Department of Interior continue to show that they are woefully inadequate to protect individual Indian trust data. Plaintiffs believe that addressing these issues requires immediate attention. The Court of Appeals has made clear that Judge Lamberth cannot act to protect this data through an appropriate injunction without an evidentiary hearing. Plaintiffs have asked the Court to expedite that process to ensure this critical data is protected. This request too has been fully briefed and awaits a decision by the district court.

A final word on litigation. As plaintiffs’ counsel we fully comprehend that litigation can be a slow and tedious process. But it also has great value in settling rights with certainty. In this case it is a sluggish march towards righting longstanding wrongs. This government has long been aware of the habitual and extraordinary nature of the mismanagement of Indian trust assets, as well as the devastating impact such malfeasance has on Indian people throughout this Nation. Yet, they did nothing about it except pay lip service. Elouise Cobell and many others pled with them to reform. But they only made promises that they then routinely broke. This was the painful reality for trust beneficiaries, until now—until the Cobell case. This case is primarily responsible for this festering problem to be addressed after a 117 years of abusive treatment by our trustee. Although frustratingly slow at times, let us not forget the great value of this case and let us not seek to stop it until the underlying mismanagement—so long standing and so long neglected—has been cured.

III. UPDATE ON MEDIATION

Mr Chairman, as you know, over the last year or so, with the urging of you, Mr. Rahall and the leadership of the Senate Indian Affairs Committee, the parties in the Cobell suit have participated in a mediation process. From the beginning, plaintiffs were thoroughly dedicated to seeking alternative resolution, but expressed concern as to whether such another such process would be successful. Lead plaintiff Elouise Cobell testified at a hearing before this Committee entitled “Can a process

²⁸ See Plaintiffs’ Exhibit 1 (emphasis added) (February 13, 2002, Norton Contempt Trial Transcript at Tr.4330:12-24).

²⁹ Plaintiffs’ briefs are attached to this testimony.

be developed to settle matters relating to the Indian Trust Fund Lawsuit?” stated without reservation: “The Cobell plaintiffs believe that the answer to this question is self-evident: Of course, such a process can be developed.” However, she further stated:

It is important to note that this case has been in litigation over seven years. It is a matter of record that time and time again the case has been unconscionably delayed as a result of government litigation misconduct. *** We, the IIM beneficiaries, on the other hand have pursued expedited resolution of this case. We have vigorously contested each and every government-sponsored delay tactic. That is the record of this case. We want resolution (more than anyone) because each and every day trust beneficiaries are dying without receiving justice.

After over a year in this mediation process, I can affirm that plaintiffs feel very much the same as we did when Ms. Cobell made that statement. We appreciate the great effort made by the leadership of this Committee and that of your dedicated staff over the last year. We are poised to mediate a resolution. But the fact is we cannot settle with ourselves. The government when they come to the table must do so with reasonable proposals or at a minimum address the settlement proposals we have sent them. That has not happened. Nor did it happen in the seven previous occasions when plaintiffs have participated in a settlement process.

To further elucidate this point, I would like to discuss briefly some of our experiences over the last year. We cannot discuss all aspects of mediation in this public forum, because we are constrained by certain confidentiality requirements. But we can say the following.

Initially, we note that plaintiffs have made substantive proposals in a good faith effort to resolve each of the three principal issues presented in this litigation: 1) IT security; 2) historical accounting, and 3) institutional trust reform—the Government has not responded or initiated any meaningful discussion of these issues. Plaintiffs’ proposals, and the Government’s continuing failure to address these issues, are addressed in Sections 1-3 below.

1. IT Security

Remedying the serious deficiencies in the security of Interior’s computer systems housing or accessing Individual Indian Trust Data is a matter of critical importance to Trust management, as the Court of Appeals has recently recognized.³⁰ Defendants acknowledged the magnitude of this problem three years ago, when they urged the District Court to enter an order providing that Interior “immediately” take steps to achieve compliance with the governing federal standard for computer security (OMB Circular A-130, Appendix III).

Defendants have fallen far short of achieving this objective. In February 2004, Interior informed the District Court that only 4 of the 62 computer systems housing Trust Data—less than seven percent—had been certified and accredited as meeting the OMB standard.

In the pre-mediation protocol which the parties negotiated on February 20, 2004—with critical assistance from staff of this Committee—it was agreed that the ongoing IT security problem would be the first issue mediated. After the mediation got underway in April of last year, however, defendants refused for more than three months to authorize the funds needed for the mediators to retain technical consultants to help them evaluate this issue.³¹ As a result, an agreement allowing for the mediators’ retention of an IT consulting firm (Red Cliff) to assist them was not reached until July 20, 2004.

In September 2004, Red Cliff submitted a “seven phase” proposal for the assessment of Interior’s computer systems. At a meeting called by the mediators on September 22, 2004, we were informed that while defendants had agreed to allow Red Cliff to proceed with Phases 1 and 2 (involving the consultants’ review of OMB Circular A-130 and other relevant security requirements), Interior was unwilling at that time to commit to any of the remaining phases of the Red Cliff proposal (including the actual testing and other assessment of Interior’s systems). We were further informed that Interior’s decision whether to go forward with Phases 3-7 of the Red Cliff proposal would hereafter be made on a piecemeal, “one phase at a time,” basis.

³⁰ Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004) (“It is indisputable that the Secretary has current and prospective trust management duties that necessitate maintaining secure IT systems in order to render accurate accountings now and in the future.”).

³¹ For example, in a joint mediation session on June 10, 2004 defendants agreed “in principle” to allow the mediators to retain an IT security expert subject to a monetary “cap” of \$25,000. Plaintiffs objected to the transparent attempt to preclude meaningful evaluation of Interior’s IT insecure systems; and another six weeks passed before the funding issue was finally resolved.

Of even greater concern, we understand that six months into this process, defendants have made no commitment to address whatever deficiencies Red Cliffs' review of their insecure systems may reveal. Nor has any proposal been made to us regarding how Interior intends to protect irreplaceable Trust Data from further corruption or loss until such time as its computer systems are finally secure.

In our view, it is in the shared interest of the parties to resolve this "first-up" mediation issue amicably. If mediation of this issue is ultimately unsuccessful plaintiffs will have a duty to report that development to the District Court.³² Until that time, plaintiffs will continue to look to this process for resolution of the IT security issue.

2. *Historical Accounting*

As indicated in the mediators' report, the Government has not responded to the proposal plaintiffs made seven months ago to resolve this issue. Nor have they presented us with any form of counter-offer.

At the mediators' request, we presented plaintiffs' specific proposal to resolve the historical accounting issue in this litigation during a joint mediation session on July 20, 2004. Representatives of Interior, Treasury and the Justice Department attended that meeting, and we provided them with a detailed explanation of the factors considered in formulating plaintiffs' proposal, addressed their questions and invited defendants' response.

When several weeks then passed without further communication from the other side, we authorized the mediators to share a July 16, 2004 letter we had given them outlining plaintiffs' proposal and the reasons supporting the proposed settlement amount.

During our September 23, 2004 meeting with the mediators, we were told that while they had no firm proposal from the Government to convey, they believed upwards of \$10-15 billion could be made available to settle the historical accounting issue presented by our case along with two other issues of purported concern to the Government—land consolidation and the prospective release of all claims of Trust management. We responded by saying (as we had on a number of prior occasions) that while we were willing to listen to the Government's proposals regarding such unrelated issues, we represented the class of 500,000 Trust beneficiaries with respect to the historical accounting and IIM trust reform issues only. We explained that we were therefore not in a position to bind our clients with respect to issues that we had not been certified to resolve on their behalf, and that we would be violating our ethical duties if we urged plaintiffs to accept less than the fair and just monetary resolution of the historical accounting issue in exchange for defendants' promise to pay a "premium" to resolve other issues outside the scope of the Cobell litigation.

That remains our position. Eighteen months ago, Congress directed the parties to make a good faith effort to resolve the issues presented in this case, and we believe that is enough of a challenge without burdening this process with such unrelated matters. Certainly we can accept no solution which would unfairly impinge upon our clients' rights to the prompt restatement of IIM trust balances that we believe to be warranted due to Trustee-Delegates' continuing breaches of fiduciary duty.

3. *Institutional Trust Reform*

No progress has been made on this front, despite the fact that "

- A decade ago, Congress enacted reform legislation requiring fundamental changes in Trust management—changes the defendants have yet to accomplish.
- Five years ago, the District Court ruled following the Phase One trial that defendants were in breach of their trust duties and remanded the case to the Trustee-Delegates to allow them to rectify such problems—a decision the Court of Appeals unanimously affirmed on February 23, 2001.
- This past week the district court reaffirmed that the accounting claim is a "live" claim in this case and with it comes a requirement that defendants reform the "the processes by which records and other documentation of transactions involving trust assets and the actions of the trustee-delegate are created, stored, preserved and so forth."³³

³² By order dated March 15, 2004, the Court allowed the voluntary withdrawal of Plaintiffs' then pending "show cause" motion based on the plaintiffs' representation that they were doing so at defendants' insistence and as a pre-condition to the parties mediating this and other Cobell case issues.

³³ Cobell v. Norton, slip op. at 15 (D.D.C. February 8, 2005). In the same opinion the Court invited plaintiffs to amend the Complaint to include asset management and other types of trust

Two weeks into the mediation process, we were informed that Interior would never agree to the appointment of a receiver to assume responsibility for rehabilitating the Individual Indian Trust until long-standing breaches of Trust duty had been rectified.

We therefore conveyed a proposal (via the mediators) on July 20, 2004 that Interior's co-Trustee Delegate, Treasury, assume responsibility for certain additional functions related to the financial management of the Trust. In making this proposal we believed the transfer of such functions to Treasury would go a long way towards responsibly resolving the serious problem with IT security (by transferring Trust Data to Treasury's more secure IT systems) and also other key areas of Trust management.

We since have been informed by the mediators that plaintiffs' proposal in this regard is "unacceptable." No explanation has been provided to us for defendants' rejection. Moreover, as with the historical accounting issue, no counter-proposal has been made.

Furthermore, when the mediators met with us on September 23, 2004 to discuss settlement "concepts," the only solution to the critical reform issue they presented for our consideration after months of deliberation was the creation of a "blue ribbon" commission to further study the trust reform issue and report to Congress on what needed to be done.

Of course, the creation of yet another panel, without more, to again re-confirm the existence of unresolved Trust management issues is wholly inadequate when plaintiffs are being asked in exchange to dismiss their trust reform claims and forego remedies achieved in the course of this protracted litigation. Fundamental changes in trust management clearly must be made to discharge the Trustee's declared fiduciary duties. Alternatively, in the event meaningful reform remains nothing more than a hollow promise, a fixed amount, equivalent to "liquidated damages" should be paid annually to our clients until such time as Interior's IT systems are finally secure and the Individual Indian Trust is finally being administered prudently.

In short, the history of this mediation raises certain salient considerations that should be noted. Plaintiffs have been more than willing to show our cards. We have identified time and again specific ways to address all the elements of this case. We stand at the ready to explore alternative avenues for resolution, but we cannot do this alone. The government must respond to proposals and explain why they are not satisfactory. That type of dialogue may lead to exploring new possibilities. It is not reasonable to simply dismiss proposals without giving any reason why they are objectionable.

We believe if both parties are compelled to come to the table and act reasonably than this case can be mediated to resolution. The leadership of this committee and your staff have considerable ability to play a vital role in this respect and we urge you to do so. You are peculiarly positioned to bring your authority to bear on the parties and compel reasonableness. We understand that this is a resource drain on already taxed resources of this committee. But plaintiffs believe we have an extraordinary opportunity to resolve this case with your continuing aid.

IV. ELEMENTS OF A SOUND RESOLUTION

We understand that this Committee is prepared to look at ways to settle the Cobell case. Plaintiffs are not prepared at this juncture to present specific proposals. But we did want to share with you a few items that we believe are important elements of a sound resolution of this matter.

1. The Proposal Must Be Fair

Any proposal must ensure that the rights of beneficiaries are not sacrificed on the altar of expediency. Section 137 of the House Interior Appropriations bill for FY 2004 failed because it gave authority to one party—the defendants—to decide the case unilaterally with only minimal judicial review. Such gerrymandering of the judicial system is plainly unacceptable, as well as unconstitutional.

Another consideration of fairness is the obligations of the United States as already determined by the Courts. Here, as defendants readily admit they owe a legal obligation to the plaintiff class which will cost multi-billions of dollars to fulfill. If a settlement proposal relieves the defendants of this legal obligation to perform an accounting, the saved resources should be considered in the settlement amount.

There are other considerations of fairness. In a class action, the beneficiaries are protected by due process, rules of procedure and defined rules of ethics. There must be assurance that these protections exist in any alternative process. Moreover, if the

reform. *Id.* at 23-24. Also, the Court made clear that the processes associated with the APA, such as limited discovery, do not control this case. *Id.* at 47-50.

consent of beneficiaries is necessary, any legitimate and constitutionally permissible process must ensure that the consent was knowing and voluntary.

Fairness and the protection of beneficiary rights must form the basis of any sound proposal. After all, these are the victims of a century of government mismanagement and should not be victimized again through an unfair resolution process.

2. The Claims Judgment Fund Should be Used for Any Resolution

This case should not be settled by utilizing funds that would otherwise be used to benefit American Indians and tribal communities. That would add insult to injury. Victims of the government's mismanagement should not be victimized again by stripping them of desperately needed and limited resources to pay for a settlement of this case. Accordingly, we believe it important to access the Claims Judgment Fund, 31 U.S.C.1301 et seq. to pay all the costs of any settlement of this matter.

3. The Proposal Must Expedite Rather than Delay Resolution

To have a prompt resolution of this case, the structure of the resolution must ensure that the Cobell claims are resolved as a whole. Piecemeal resolution will not be expeditious and will make it difficult for beneficiaries to make fully informed and knowledgeable decisions regarding their rights. It is important to note that if the government believed that it could make fair offers to beneficiaries to buy out their claims, they could approach the Court with a proposal without any additional legislation. Such proposals would be analyzed to determine that they do not make any false or misleading assertions. The need for such due process protections are self-evident. The only thing legislation could possibly do is diminish these protections, which we believe is ill-advised.

Furthermore, Congress must recognize that its actions can lead to delay rather than expedition of resolution. As mentioned earlier, the Midnight Rider is a principle example of this. It did not advance this case at all, but rather undermined the ability of the Courts to determine issues central to this litigation.

4. The Proposal Should Not Be a Forum to Re-litigate Settled Issues

Any resolution should strive not to reconsider issues already resolved through the litigation. Over the last eight and one-half years, the District Court and Court of Appeals have decided numerous issues and defined the nature and scope of the obligations owed to beneficiaries. An appropriate approach is to use the Court's decisions to govern which methodologies are appropriate and consistent with law and the rights of beneficiaries as judicially established and confirmed.

5. The Proposal Must Be Consistent with Trust Law

Any resolution should be grounded in the basic and elementary principles of trust law including, without limitation, that all inferences are against the trustee and for the beneficiary. For example, if the trustee does not have documentation, then trust law says that one presumes whatever is best for the beneficiary (e.g. if the trustee has inadequate records to support a disbursement, then it is presumed the disbursement was not received by the beneficiary and should be credited to the account). We believe it appropriate that settlement proposals must have this principle at their core or, by definition, they will undermine the well-settled rights of beneficiary class.

6. The Proposal Must Be Constitutional

It should go without saying that any proposal to resolve this case must pass constitutional muster. With on-going litigation, particularly where the Court's have already made final unappealable decisions about the rights of a party, as here, any resolution that does not achieve full participation by the parties and informed consent to the settlement process is fraught with material constitutional infirmities. The interests that Individual Indian Trust beneficiaries have in their trust assets are protected by the Fifth Amendment Due Process and Takings Clauses.³⁴ Indeed, not only the actual "interest" in the asset but also any cognizable claim (i.e. the accounting) is a 5th Amendment protected property interest.³⁵ In short, any

³⁴ See *Babbitt v. Youpee*, 519 U.S. 234 (1997) (individual trust interest protected by Fifth Amendment even if de minimis); *Hodel v. Irving*, 481 U.S. 704 (1987).

³⁵ See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982) (Noting that Supreme Court struck down in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a state law that terminated the "rights which beneficiaries would otherwise have against the trust company...for improper management of the common trust fund...[because it] worked to deprive the beneficiaries of property by, among other things, cut[ting] off their rights to have

legislatively imposed resolution which alters the claim in order to limit the United States' liability for the breaches of trust would necessarily violate the Constitution.

V. CONCLUSION

Mr. Chairman, let me conclude by reiterating the plaintiffs commitment to resolving this case. We have vigorously pursued litigation because we want resolution. We do not care if achieving fairness and stopping abuse of individual Indian beneficiaries comes through litigation, mediation or a settlement act, or arbitration for that matter. The means are unimportant. What is important is that we do so quickly and fairly.

I will leave you with the following passage from a report commissioned and prepared for Congress some years ago:

In the first place the machinery of government has not been adapted to the purpose of administering a trust.

On the other side, behind the sham protection which operated largely as a blind to publicity, have been at all times great wealth in the form of Indian funds to be subverted; valuable lands, mines, oil fields, and other natural resources to be despoiled or appropriated to the use of the trader; and large profits to be made by those dealing with trustees who were animated by motives of gain. This has been the situation in which the Indian Service has been for more than a century—the Indian during all this time having his rights and properties to greater or less extent neglected; the guardian, the Government, in many instances, passive to conditions which have contributed to his undoing.

And still, due to the increasing value of his remaining estate, there is left an inducement to **fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension.**³⁶

As you can see from the citation, this is a report from 1915. They knew back then of the “fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension.” I can show you similar findings in reports from the 1920s, 30s, 40s 50s, all the way up to present. When and how will this nightmare administration of our trust property end?

We have a chance right now to stop this “fraud, corruption, and institutional incompetence.” With help from this Committee, we can make sure that the abuse present in 1915 is not still present in 2015.

[NOTE: Attachments to Mr. Harper's statement have been retained in the Committee's official files.]

The CHAIRMAN. A couple of questions that have come up. One is that in your prepared testimony, you suggest what the liability to the Department may be. I have read, along, I believe, with everybody else, reports in the press as to how much is owed on this.

I guess my question is that no one really knows what the liability is at this point and I am not sure that it is wise to be throwing numbers out there that no one can substantiate. Could you comment on that?

Mr. HARPER. Thank you, Mr. Chairman. Yes. I think it is important to recognize what those numbers represent. The parties agree on certain fundamental issues. One of the issues is that approximately \$13 to \$14 billion, in that range, was produced between about 1909 and the year 2000 from the individual Indian trust monies. Now, those are broad approximations and it is within a couple hundred million, but it is still a pretty good agreement on such an important issue.

When you take that amount and you say that no money was ever paid, right, that amount would include the numbers that we are talking about, in the hundreds of billions. That is not to say, and

the trustee answer for negligent or illegal impairments of their interests.” (emphasis added; internal quotes and citations omitted).

³⁶“Business & Accounting Methods, Indian Bureau,” Report of the Joint Commission of the Congress of the United States, 63rd Cong. 3d Sess., at 2 (1915).

we fully recognize that there has been money that is paid to beneficiaries, the point being is that it is the trustees' obligation to demonstrate which monies were paid to the beneficiaries.

Now, the only evidence we have so far that the trustees, the trustee delegate in performing its accounting is the Ernst and Young report. That is riddled with errors. It doesn't have any support. We want to go to trial on that issue.

The bottom line is this, Mr. Chairman. We believe that accounting is impossible and spending a dime on performing an accounting is wasting a dime. That is clear as day, that the resolution has to come from figuring out an alternative methodology consistent with trust law principles—that is a vital part of it—and those trust law principles include that the evidence is presumed to be with the trustee for the beneficiary.

We are at the table. We are willing to look at whatever proposals there are. Part of the frustration on our end is that we haven't seen any proposals from the government. We have put forward ones and we haven't gotten counteroffers, and so we await that process where we can see a proposal from the government.

The CHAIRMAN. Based on that response, would it help to speed a resolution of the lawsuit if Congress defined the method of accounting that must be done?

Mr. HARPER. It seems to me that the methodology for doing an accounting is well settled. Trust law provides the answers to all these questions. When accounting is impossible, then there are certain ways for the court to look at the available evidence and correct the account balances and restate those account balances, you conform it to your trust law. We have proposed one methodology to do that in our January 6, 2003, plan. I could certainly submit that for the Committee if you are interested.

The point being that we don't think it is—from the first instance, that we should depart from those generally prescribed notions well settled in law. One of the things that we strive to do in this litigation is to establish a simple principle, that just because the beneficiaries here are Indians and just because the trustee is the United States does not mean we have some lesser standard of care, does not mean that we have some lesser duty to account, that the government owes us the same duty to account, and that duty prescribed in law requires that when the accounting is impossible, that alternative methods consistent with trust law be used.

And so I guess to answer your question, we think that Congress—the other last point I would make is this, that the recent December 10 decision in the Court of Appeals made clear that whatever Congress does, it must be sure that each beneficiary gets, and this is a quote, “his due or more.” And I think that that is very important. So whatever methodology it is, it has to be consistent with that principle.

The CHAIRMAN. I understand what you are saying, but I think some of the facts that you state or some of the opinions that you give is what is the heart of the case, if that is what is in dispute. That is part of the problem.

Let me ask you this. If we were to move forward with looking at legislation on this, are you prepared to work with us, with this

committee and with the Senate committee, to try to come up with a fair and equitable settlement on this?

Mr. HARPER. Without any reservation. You are here to do that. We want to work with you closely to find resolution. I mean, part of this problem is this. There are so many lost documents that nobody knows when you have that many lost documents what happened to those transactions. The best way sometimes to figure that out is a rough justice approach. That may be what is required here through some type of an agreement, and we would want to work with you in developing how that gets done.

The CHAIRMAN. If we ultimately move forward with this, which at this point I believe we will, who has the authority to sign off on a settlement, to sign off on an agreement?

Mr. HARPER. For matters that are within the confines, the parameters of the Cobell litigation, ordinarily, Rule 23 of the Federal Rules of Civil Procedure, which is the rule that governs class actions, allows for the main plaintiffs to initially sign off. That does not mean for due process concerns that there may not be a—take a hearing where objections can be heard. But as far as that initial sign-off, it is generally allowed to be done through the main plaintiffs.

The CHAIRMAN. And that is who you represent?

Mr. HARPER. Precisely, yes.

The CHAIRMAN. All right. Thank you.

Mr. Faleomavaega?

Mr. Faleomavaega. I want to thank Mr. Harper for appearing this morning in the Committee. I have just a couple of questions.

I was somewhat caught off guard in Mr. Cason's earlier statement saying that the Department of Interior is not in a decision role making agency in this whole thing, and then I don't know if I totally agree with the gentleman in this assessment of this situation. You know that last year, on a bipartisan basis, the Chairman of the Senate Indian Committee and Mr. Inouye and our own Chairman, Mr. Pombo, and our Ranking Member, Mr. Rahall, initiated what was then known as a mediation effort to see if the parties would come to the table and come to agreement. Obviously, this didn't work.

Could you give us some concerns as to why the offered mediation effort also collapsed? I know there was acrimony. There was a lot of animosity, I suppose, between the plaintiffs and the administration. But can you give us your perspective as to why the many efforts at mediation just did not work?

Mr. HARPER. Sure. Thank you. Yes. I think I would refer to my written testimony which details a number of these things, but a couple of salient points on that.

The mediation, I think, as I understand it, is continuing, and we are continuing in that process and we are engaged on that process. So I don't think it is at that point where we would think it is at an end. In fact, in some ways, it never really began. We had mediators, but as far as the types of substantive discussions that would lead to a resolution, I think it got off track on many procedural issues, the hiring of experts and things of that nature.

On the substantive questions of settlement, we had put forward proposals on all three of the main issues in this case: Trust reform,

IT security, and historical accounting. Those were never answered and no counteroffer was never given. And so we are sort of wrecked at the table. We have to ask the question—obviously, we cannot settle with ourselves. We are looking for any partner in this process, in whatever process it might be. Is it through arbitration? Is it through settlement legislation? Is it through mediation? Whatever the case may be, we are there and we are prepared to work to resolve this quickly, this issue for our beneficiary class.

Mr. Faleomavaega. So it was on the procedural aspects of the mediation that things just didn't work out very well in terms of your efforts.

There was also an earlier statement by Mr. Cason about the concern about the personal liability of Department of the Interior officials, should they be found—I really don't think that these people purposely would steal the money, maybe because they didn't know how to manage the funds. What is the plaintiffs' position on this? Is this also what you are pursuing, to find liability on these—personal liability on these Department of Interior officials for not doing their job?

Mr. HARPER. Let me put the question in some context, because we are not seeking liability for individuals for stealing or something of that nature. What we are seeking accountability for is to tell the truth to courts, simple propositions like that.

When a person comes and is a witness before a court and files a document, they have an obligation to tell the truth, and when they don't do that, it is our obligation as counsel for the plaintiffs to point that out to the court and make sure they are held accountable.

A number of years ago, a former Republican Senator said that if this trust were managed by anybody else, people would be in jail, and that is true. One of the major problems in this trust is that there is absolutely no accountability, and one of the ways that we have to ensure accountability is that taking measures to hold people accountable when they file reports to the court, when they file briefs with the court. Those things are critical to ensuring that we have a—we can move forward on trust reform.

Mr. Faleomavaega. Is there ever any question of the part of the administration, because I notice in your statement that it seems that there is some clear legal differences of opinion about this whole aspect of the trust funds. I believe your submission to the court or before the court was that this is a trust responsibility that has been violated by the Federal Government, as opposed to the defendants saying, no, this is just an administrative problem that we had here. Therefore, we have no trust responsibilities. What exactly is the court's ruling now, even up in the appellate level, on this case? Is it a violation of the trust responsibility of the Federal Government, or are we still doing around with the fact that it is an administrative procedure problem that has caused this?

Mr. HARPER. I appreciate the question because it is something that I wanted to clarify. The fact is that the Court of Appeals said on December 3 that this is a trust case and this is a Indian case, and those, quote-unquote, salient considerations make it different from the normal administrative law case. So the courts have spoken on this issue, and we believe spoken quite clearly.

When you have a fiduciary responsibility, you are treated as a fiduciary. You have to manage that property and you are judged based on fiduciary standards. That is the way. And that is what we have here. The courts have also concluded that there is a strict duty to account, that that duty to account is similar to every other trust beneficiary's—excuse me, trustee's duty to account, and that responsibility also hasn't been fulfilled and that there has been a breach of trust.

So all these are things that have been decided in the courts, and I understand the frustration. Believe me, none of us gives nine years, day to day, having this grind, going out to Indian country, visiting people, for example, on the Navajo reservation, Navajo Arapees that I see. We are building on one of the largest natural gas reserves in the world and they are living in huts. They should be living like Saudi Arabians, but they are living in huts. Now, that is a breach of trust. That is mismanagement. That has to stop.

So we are as frustrated as anybody to get this problem fixed, but it has to be done in the right way and it has to be done not for pennies on the dollar but for an amount consistent with what these beneficiaries are owed.

Mr. Faleomavaega. On the basis of your lawsuit, just on this issue alone of trustee responsibility, and I notice the defendants filed a lawsuit to dismiss the whole case altogether, that it had nothing to do with trust responsibility between the Indian country and the Federal Government. That really, in my own mind—and I am sorry, Mr. Chairman, I am taking a little time, if it is all right with you—and I sincerely hope that maybe the only other option now is to provide some kind of a Congressional legislation, which I sincerely hope that my Chairman will seriously consider this possible option.

I would like to ask you, Mr. Harper, if the Congress should decide that maybe this is the only possible settlement, is by legislation, what would be your recommendations in terms of some of the things that ought to address this proposed legislation, if it should come to that level with the members of the Committee and our good Chairman?

Mr. HARPER. It is a great question and I think I can point to a couple of things. One is that we believe it would be problematic to take any monies used to settle the Cobell case from appropriations that would ordinarily go to Indian country, ordinarily go to the Interior Department. And so we hope that this committee would look to the Claims Judgment Fund, for example, as a source for funding any resolution. We believe that that is a way to get the settlement but not have it such that we also have the inequity of taking from Indian country to pay for the resolution of this mismanaged trust.

I think that one of the ways that we would hope to explore resolution is to start talking about reasonable dollar amounts. We know how much went through the trust. We know the parameters of how much could potentially be owed. And I think it is a matter of figuring out what is a reasonable settlement amount based on those parameters, and we look forward to working with the Committee on figuring that out.

I would also just mention that we also have to do something about figuring out how we reform the trust. Just because you have a resolution of the historical accounting looking back, you still have the issue of reforming the trust, and we look forward to working with the Committee on that, as well.

Mr. Faleomavaega. You are agreeing with what the administration is trying to do in reorganizing the structure of the BIA to have this trust, or whatever it is, to make sure that these funds should be better accounted for and making sure that individuals as well as tribes are properly given the compensation that they deserve for the leases and all of that?

Mr. HARPER. No.

Mr. Faleomavaega. Here is my problem. We are about to pay, what, \$200 million a year just to administer, and then we haven't even paid you one cent yet after nine—actually, it is more than nine years, Mr. Harper. We started this since 1990. I remember this distinctly with Congressman Richardson, trying to work this whole thing. It started also with \$20 million to provide some kind of accounting, which turned out to be zero. It didn't have any impact on this thing.

I am just concerned if by way of restructuring the administration that this might be a help, and like you suggested about reforming the BIA in such a way that there is better accounting of the leases and whatever is owed to the Indian people.

Mr. HARPER. To answer your question, no we don't agree with the reorganization. We believe that it is a waste of resources. We believe it is money not well spent. It doesn't address the fundamental problems in the system. It doesn't address, for example, the fact that in many places, there is no accounts receivable system. It doesn't address the negotiation of leases for less than fair market value. There are so many problems that it does not address.

But what you can say about it, you can analogize and basically say it is rearranging the deck chairs on the Titanic, and we think that that is an appropriate analogy for what the reorganization is doing. We don't think it is going to move ultimately to a reformed trust. We think fundamental changes have to occur that are quite distinct from what is going on in the Department right now.

Mr. Faleomavaega. I know we have to be very careful on this, as my chairman had cautioned me about some kind of a settlement. We are throwing all kinds of numbers and I just wanted to—and I suspect you probably don't want to throw out any numbers, as well. I think this tends to be the heart of the problem for the members of the Committee, as well.

What are we looking at in terms of round-about figures? Since now there is no accountability, I mean, the accountability is impossible to—I get the sense from Mr. Cason that every penny should be accounted first before giving the funds. I am really puzzled here in terms of what are we really looking at. I hate to suggest \$160 billion, but what is something that is more realistic in terms of all the nine years that you have expended your time and effort in looking over the records, talking to the Indian communities, and all of this?

As I said, the last time when I talked to Ms. Cobell, at least as an initial thought, there was somewhere between zero to

\$13 billion, and Mr. Chairman, I am not trying to resolve the settlement issue right here, but I am just trying to figure out what numbers are we looking at, basically.

Mr. HARPER. Well, through the mediation process, we did present the government with a specific number, but because of the nature of that process, I am not sure it is appropriate to divulge that in this public forum. We would, of course, be—we want to work with the Committee to figure out what that number is, and I think it would be inappropriate at this early juncture, where we are exploring what are the best avenues, to come out with a specific number or even a range of numbers.

Mr. Faleomavaega. I want to say, Mr. Chairman, I cannot thank you enough again for your leadership and initiative in calling this hearing, and I sense very well that we will continue to pursue this issue that we have not been able to find a resolution for 15 years now. I look forward to working with you and see if we can find a resolution to this.

Thank you, Mr. Chairman, and thank you, Mr. Harper.

The CHAIRMAN. I want to thank Mr. Harper for his testimony. If there are further questions, they will be submitted to you in writing, if you can answer them in writing so that they can be included as part of the hearing record.

Mr. HARPER. Of course.

The CHAIRMAN. I realize that this is an ongoing case and it makes it difficult sometimes to answer questions. I appreciate you making the effort to be here and enlighten the Committee as much as you did. Thank you for that.

Mr. HARPER. Thank you, Mr. Chairman.

The CHAIRMAN. If there is no further business before the Committee, I again thank the members of the Committee, thank our two witnesses today, and the Committee stands adjourned.

[Whereupon, at 1:06 p.m., the Committee was adjourned.]

[A statement submitted for the record by Mrs. Cubin follows:]

Statement of The Honorable Barbara Cubin, a Representative in Congress from the State of Wyoming

Mr. Chairman:

My state serves as the home to two Indian tribes, the Eastern Shoshone and the Northern Arapaho. Together, they share the Wind River Reservation, which lies in west-central Wyoming. As is the case in most of Wyoming, these large land based tribes have been blessed with a substantial amount of natural resource interests—particularly oil and gas production—which gives them substantial financial interests in the outcome of the lawsuit we will revisit today.

For more than a century the federal government has been the trustee of funds for Indian tribes as well as individual Indians. These trust funds, generated from rights and leases, have become a significant source of funding for many Indian tribes all across the nation. Unfortunately, every year—every day—that this court case remains unresolved, we run the dual risk of continued mismanagement of these trust funds and an overburdening of staff and resources at the U.S. Department of Interior.

While the appointment of co-mediators last year was an encouraging step in the right direction, I am curious to hear today what, if any, progress has come of that process. I am also hopeful that our two witnesses will help bring clarity to this issue regarding what is the next step forward and what role this body should take in finding a solution soon.

Thank you, Mr. Chairman for your continued focus on this important issue and I yield back the balance of my time.

